Supreme Court, U.S.
FILED

961179 JAN 22 1997

Case No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

1996 OCTOBER TERM

ALTAMONT GAS TRANSMISSION COMPANY, *et al.*,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI OF INDICATED EXPANSION SHIPPERS

Roger A. Berliner, Esq.
John M. Binetti, Esq.*
Brady & Berliner
1225 - 19th Street, N.W., Suite 800
Washington, D.C. 20036
Attorney for Indicated Expansion Shippers
(*Counsel of Record)

January 22, 1997

340 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the U.S. Court of Appeals for the District of Columbia Circuit in *Altamont Gas Transmission Company, et al., v. Federal Energy Regulatory Commission,* 320 U.S. App. D.C. 98, 92 F. 3d 1239 (D.C. Cir. 1996)("*Altamont*") correctly construed the application of the Hinshaw Amendment to the Natural Gas Act, § 1(c) of the Natural Gas Act, 15 U.S.C. § 717(c), to the jurisdiction of Federal Energy Regulatory Commission in *Pacific Gas Transmission Company*, FERC Docket Nos. CP89-4360-000, et al., by determining that the Federal Energy Regulatory Commission may not even consider the jurisdictional implications of orders issued by the California Public Utilities Commission that effectively created a tying arrangement between interstate and intrastate pipeline capacity which unduly discriminated against interstate shippers of natural gas.

Whether the decision of U.S. Court of Appeals for the District of Columbia Circuit in *Altamont* construes the Hinshaw Amendment to the Natural Gas Act, § 1(c) of the Natural Gas Act, 15 U.S.C. § 717(c), in a manner that does violence to the Supremacy Clause of the U.S. Constitution.

Whether the Federal Energy Regulatory Commission is precluded from considering the effects of a state regulatory order directed at a Hinshaw pipeline that results in undue discrimination against interstate shippers of natural gas, in violation of sections 4, 5 and 7 of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d and 717f, in determining the public convenience and necessity of a natural gas transmission facility, subject to the jurisdiction of FERC under section 7 of the Natural Gas Act, 15 U.S.C. § 717f.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The following are parties, intervenors and amici to the proceeding before the United States Court of Appeals for the District of Columbia Circuit in *Altamont Gas Transmission Company, et al., v. Federal Energy Regulatory Commission*, 320 U.S. App. D.C. 98, 92 F. 3d 1239 (D.C. Cir. 1996):

Altamont Gas Transmission Co.
Amoco Production Co. and Amoco Canada Petroleum Co. Ltd.
California Public Utilities Commission
Canwest Supply Inc./U.S.A.
Cascade Natural Gas Corp.
Chevron U.S.A., Inc.
El Paso Natural Gas Co.
Foothills Pipe Lines Ltd.
Great Lakes Gas Transmission
Imperial Irrigation District Limited Partnership
Independent Petroleum Assn. Of America
Norcen Marketing, Inc.
North Canadian Oils Ltd.
Northern CA Power Agency
Pacific Gas & Electric Co.
Pacific Gas Transmission Co.
Pan-Alberta Gas Ltd.
PanCanadian Petroleum Co.
Petro-Canada Hydrocarbons, Inc.
Southern CA Edison Co.
Southern California Gas Co.
Southern California Utility Power Pool
Suncor, Inc.
Turlock Irrigation District
Union Pacific Resources Co.
Washington Energy Exploration, Inc.

Petitioner, Indicated Expansion Shippers (IES), is an *ad hoc* group of shippers which hold firm capacity on the Pacific

Gas Transmission Company Expansion Project. The membership of IES is comprised of North Canadian Oils Limited, Norcen Marketing, Inc., and Chevron U.S.A.

Norcen Marketing, Inc., is a Delaware corporation, engaged in the production and marketing of natural gas, and is a wholly owned subsidiary of Norcen Explorer, Inc., also a Delaware corporation. Norcen Explorer, Inc., is a U.S. subsidiary of Norcen Energy Resources Limited, a company incorporated under the laws of Canada with its principal place of business in Calgary, Alberta, Canada. Both Norcen Marketing, Inc. and Norcen Explorer, Inc. have their principal places of business in Houston, Texas.

At the time of the filing of the docketing statement in the proceeding before the Circuit Court in this case, North Canadian Oils Limited was a Canadian natural gas exploration, production, and marketing company, incorporated under the laws of Canada, with its principal place of business in Calgary, Alberta, Canada. On April 1, 1993, approximately 50.5% of the stock of North Canadian Oils Limited was acquired by Norcen Energy Resources Limited. The remaining stock was widely held. On May 25, 1995, North Canadian Oils Limited was amalgamated with Norcen Energy Resources Limited.

The only non-wholly owned subsidiary of Norcen Energy Resources Limited is its propane marketing division, Superior Propane, Inc., a Canadian corporation.

Chevron U.S.A., Inc. is engaged in the exploration, development and production of natural gas. Chevron U.S.A., Inc. is also a large consumer of natural gas in California in enhanced oil recovery and refining operations as well as a shipper of significant volumes of gas into California on various interstate pipelines including Pacific Gas Transmission Company.

Chevron U.S.A., Inc. Is a wholly owned subsidiary of Chevron Corporation. The non-wholly owned subsidiaries of Chevron U.S.A., Inc. are Atlas Supply Company, Chevron do Brasil Ltda., Chevron Mineral Corporation of Ireland, Servicios

Chevron, S.A. de C.V., Companiea Minera Chevron Dominicana, S.A., Felix Oil Company, Gulf Oil Zaire S.A.R.L., NGC Corp., and Pembroke Capital Company, Inc.,

TABLE OF CONTENTS

Section	Page
Questions Presented For Review	i
Parties To The Proceeding In The Court of Appeals	ii
Table of Contents	v
Table of Authorities	vii
Rulings Under Review	1
Basis For Jurisdiction	2
Statutory Provision Involved in This Case	2
Statement of the Case	3
Basis for Federal Jurisdiction in the U.S. Court of Appeals	3
Facts Material to Consideration of the Questions Presented	3
Reasons For Granting Certiorari	7
I. The U.S. Court of Appeals for the District of Columbia Circuit has Decided An Important Question of Federal Law In This Case Which Has Not, But Should Be, Settled By The Supreme Court	7
A. Summary of Argument	7
B. The Decision of The Circuit Court Is Unprecedented and Misconstrues the Scope of the Hinshaw Amendment to the Natural Gas Act	9
C. The Decision of The Circuit Court Inverts Federal Preemption Law And Does Violence To The Supremacy Clause of the U.S. Constitution	14
D. The Crossover Ban is Not a Mere "Bookkeeping Convention", But a Device By Which A State Regulatory Body Has Preempted Federal Regulation	17

E. The Circuit Court Decision Reverses An Inappropriate Remedy Ordered By FERC By Allowing State Preemption Of Federal Statutory Protections For Interstate Natural Gas Shippers 20
II. Conclusion 22

Appendix

Decision of the U.S. Court of Appeals ..... App. 1
FERC Orders ..... App. 2
Orders on Rehearing ..... App. 3

TABLE OF AUTHORITIES

Court Cases	Page
Altamont Gas Transmission Company, et al., v. Federal Energy Regulatory Commission, 320 U.S. App. D.C. 98, 92 F. 3d 1239 (D.C. Cir. 1996)	1,2,8,9,10,11,12
ANR Pipeline Co. v. FERC, 876 F.2d 124 (D.C. Cir. 1989)	12,13,20
ANR Pipeline Co. v. F.E.R.C., 71 F.3d 897 (D.C. Cir. 1995)	16
Associated Gas Distributors v. FERC (AGD I), 824 F.2d 981 (D.C. Cir. 1987)	20
Atlantic Refining Co. v. Public Service Comm'n, 360 U.S. 378 (1959)	16
City of Mishawaka v. American Electric Power Co., Inc., 616 F.2d 976 (7th Cir. 1980)	15
FPC v. Conway Corp., 426 U.S. 271 (1976)	10,11,12,16
FPC v. Transcontinental Gas Pipe Line Co., 365 U.S. 1 (1961)	12,13,16
Illinois Commerce Commission v. Interstate Commerce Commission, 749 F.2d 875 (D.C. Cir. 1984)	16
Louisiana Power & Light Co. v. FPC, 483 F.2d 623 (5th Cir. 1973), cert. denied, 416 U.S. 974 (1974)	8
Maryland People's Counsel v. FERC, 761 F.2d 780 (D.C. Cir. 1985)	14,16
Northern Natural Gas Co. v. State Corporation Commission of Kansas, 372 U.S. 84 (1963)	8

Page

Northwest Central Pipeline v. State Corp. Comm'n, 489 U.S. 493 (1989) 20

Office of Consumers Counsel v. FERC, 655 F.2d 1132 (D.C. Cir. 1980) 13

Panhandle Eastern Pipeline Co. v. FPC, 324 U.S. 635 (1945) 16

Plaquemines Oil and Gas Company v. FERC, 450 F.2d 1334 (D.C. Cir. 1971) .. 21

Public Utilities Commission of California v. FERC, 900 F.2d 269 (D.C. Cir. 1990) ... 8

United Distribution Companies, et al. v. FERC, 319 U.S. App. D.C. 42, 88 F.3d 1105 (D.C. Cir. 1996) 7,8,15,16

Schenidwind v. ANR Pipeline Co., 485 U.S. 293 (1988) 20

Agency Cases

CPUC Decision 91-06-053, issued June 19, 1991 5

Pacific Gas Transmission Company, "Preliminary Determination on Nonenvironmental Issues," 54 FERC ¶ 61,035 (Jan. 22, 1991) 1,4

Pacific Gas Transmission Company, "Order Issuing Certificate, Granting and Denying In Part Rehearing and Clarification," 56 FERC ¶ 61,192 (Aug. 1, 1991) 1,5,18

Pacific Gas Transmission Company, "Order on Report and Modifying Prior Order," 57 FERC ¶ 61,097 (Oct. 24, 1991) 1,5,18

	Page
Pacific Gas Transmission Company, "Order Granting In Part and Denying In Part Requests for Rehearing and Clarification," 62 FERC ¶ 61,243 (March 16, 1993)	1,6
Union Pacific Fuels, et al. v. Southern California Gas Company, 76 FERC ¶ 61,300 (September 19, 1996)	8
Constitution	
Supremacy Clause of the U.S. Consitution, U.S. Const., Art. VI, cl. 2	14,16,19,21
Statutes	
Hinshaw Amendment to the Natural Gas Act, § 1(c) of the Natural Gas Act, 15 U.S.C. § 717(c)	2,6,7,8,14,16,19,21
Section 4 of the Natural Gas Act, 15 U.S.C. § 717c	7
Section 5 of the Natural Gas Act, 15 U.S.C. § 717d	7
Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c)	3,7,10,13
Section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e)	7,10,13
Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b)	3
28 U.S.C. § 1254(1)	2
Other Authorities	
S. Rep. No. 817, 83rd Cong. 1st Sess. (1953), reprinted in 1954 U.S. Code Cong. & Admin. News 2101	16

RULINGS UNDER REVIEW

The citation of the opinion of the U.S. Court of Appeals for the District of Columbia Circuit in this case is *Altamont Gas Transmission Company, et al., v. Federal Energy Regulatory Commission*, 320 U.S. App. D.C. 98, 92 F. 3d 1239 (D.C. Cir. 1996).

The citations of the opinions of the Federal Energy Regulatory Commission under review by the U.S. Court of Appeals in this case are:

Pacific Gas Transmission Company, "Preliminary Determination on Nonenvironmental Issues," 54 FERC ¶ 61,035 (Jan. 22, 1991)("FERC January 22 Order") ;

Pacific Gas Transmission Company, "Order Issuing Certificate, Granting and Denying In Part Rehearing and Clarification," 56 FERC ¶ 61,192 (Aug. 1, 1991)("FERC August 1 Order");

Pacific Gas Transmission Company, "Order on Report and Modifying Prior Order," 57 FERC ¶ 61,097 (Oct. 24, 1991)("FERC October 24 Order"); and

Pacific Gas Transmission Company, "Order Granting In Part and Denying In Part Requests for Rehearing and Clarification," 62 FERC ¶ 61,243 (March 16, 1993)("FERC March 16 Order").

BASIS FOR JURISDICTION

The Judgement of the U. S. Court of Appeals for the District of Columbia Circuit in *Altamont Gas Transmission Company, et al., v. Federal Energy Regulatory Commission,* 320 U.S. App. D.C. 98, 92 F. 3d 1239 (D.C. Cir. 1996) was issued on August 23, 1996. Per Curium Orders denying petitions for rehearing, including the petition for rehearing filed by Indicated Expansion Shippers, were issued on October 24, 1996.

The jurisdiction of the Supreme Court in this case is based upon 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED IN THIS CASE

The Hinshaw Amendment to the Natural Gas Act, §1(c) of the Natural Gas Act (or "NGA"), 15 U.S.C. § 717(c), states as follows:

> (c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

STATEMENT OF THE CASE

Basis for Federal Jurisdiction in the U.S. Court of Appeals

The U.S. Court of Appeals for the District of Columbia Circuit was vested with jurisdiction over the petition for review filed by Indicated Expansion Shippers in D.C. Circuit Case No. 91-1369 under section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

Facts Material to Consideration of the Questions Presented

Pacific Gas Transmission (PGT) is an interstate pipeline that transports gas from the Canadian border to the northern California border at Malin, Oregon, where it interconnects with the California pipeline facilities of its parent, Pacific Gas & Electric Company (PG&E). As such, PGT is a natural gas company subject to the jurisdiction of FERC within the meaning of Section 1 of the NGA. PGT was built by and is wholly owned by PG&E, which purports to be a Hinshaw Pipeline within the meaning of Section 1(c) of the NGA and thereby exempt from FERC's jurisdiction. Until the in-service date of the PGT Expansion, PG&E held exclusive rights to all firm PGT capacity from the international border to the California border at Malin, Oregon and dominated sales of natural gas within northern California.

The Petitioners and Intervenors before the U.S. Court of Appeals were comprised of a competitive pipeline project seeking to also serve southern California markets, and domestic and Canadian producers and marketers who wanted to compete with PG&E for gas sales in northern California by selling gas to their own end-use customers in that service area.

In 1988, PGT filed an application pursuant to Section 7(c) of the NGA, to expand its interstate facilities in order to transport additional quantities of natural gas for utilities in southern California and in the Pacific Northwest. Initially, the

Project limited capacity solely to utilities in southern California and the Pacific Northwest. It was only when PGT was unable to fully subscribe the project that it opened it to independent gas sellers who wanted to compete with PG&E in the northern California market. However, PGT refused to permit these gas sellers to deliver and sell gas at the delivery point for northern California—Malin, Oregon. Rather, these shippers were required to also contractually commit to firm transportation services on PG&E's proposed expansion facilities and transport gas to southern California—even if they only sought to serve markets in northern California in competition with PG&E.

Numerous protests were filed with FERC alleging that PGT's application was seeking to protect its parent PG&E from competition by denying direct access to the northern California market at Malin, Oregon. The protestants argued that prospective shippers on PGT could not be compelled to take expensive additional transportation service on PG&E as a condition of obtaining interstate capacity to the northern California border. FERC issued a preliminary order on January 22, 1991, which found PGT's initial allocation of capacity and its single rate proposal requiring transportation on PG&E's proposed pipeline facilities in California to be discriminatory. FERC January 22 Order, 54 FERC ¶ 61,035 (1991). FERC ordered PGT to hold a new open season, to remove the discriminatory language from its tariff, and to establish Malin, Oregon as a delivery point on PGT's system at the California border. *Id.* at 61,154.

After FERC's January 22 order, petitioner-shippers (and intervenor-shippers below) signed binding 30-year service agreements with PGT for transportation services on the PGT Expansion Project. Those contractual agreements became binding on April 25, 1991. However, two days before the 30 year transportation service agreements were deemed binding, PG&E requested its state regulatory body, the California Public Utilities Commission (CPUC), to restrict access by PGT Expansion shippers to PG&E's existing intra-California transportation facilities. The CPUC approved PG&E's request for a "cross-over ban" in June of 1991, requiring that any gas delivered to

the terminus of the PGT Expansion at the California border at Malin utilize the PG&E Expansion for transportation within California. CPUC Decision 91-06-053, issued June 19, 1991.

Rather than selling f.o.b. at Malin, and thereby incurring only PGT's transportation charge, PGT expansion shippers were now required to pay PG&E an additional amount, approximately equal to the PGT Expansion tariff, to pay for PG&E's expansion facilities despite the fact that PGT Expansion shippers neither desired nor needed to use those facilities. By contrast, no other interstate shipper, including interstate shippers on PGT's non-expansion facilities, is required to pay for any intrastate facilities as a condition of interstate service.

In August of 1991, FERC found that the CPUC's action had retied the PGT and PG&E expansions, effectively eliminating the ability of an interstate PGT shipper to sell gas at the California border without also paying for the unwanted intrastate facilities. FERC concluded that the discriminatory arrangement between PGT and PG&E frustrated federal jurisdiction and that it could not "find the public convenience and necessity served until the anticompetitive nature of the tying arrangement is eradicated." FERC August 1 Order, 56 FERC ¶ 61,192 at 61,725. Accordingly, FERC used its conditioning authority under Section 7(e) of the NGA to forbid commencement of construction of the PGT Expansion until the Commission could be assured "that PGT shippers are receiving nondiscriminatory treatment as to access to the California markets by means other than on the PG&E expansion." *Id.* at 61,726.

Without making further findings, FERC issued a further order on October 24, 1991, narrowly approved by a 3-2 vote, which radically altered the condition imposed on PGT's certificate. FERC October 24 Order, 57 FERC ¶ 61,097. Although FERC admitted that PGT had not demonstrated that shippers would not be subject to unduly discriminatory restraints, FERC argued, for the first time, that the need to construct the facilities in a timely manner required a modification of the condition. FERC replaced the ban on construction with a modest

penalty attached to PGT's return on equity. *Id.* at 61,361. Two commissioners, Trabandt and Langdon, dissented, the latter commenting that the order "not only fails to stamp out discrimination where it has been discovered, but goes further awry by actually authorizing the implementation of that unduly discriminatory practice." *Id.* at 61,361-362.

Rehearing of the FERC October 24 Order was sought by petitioners on the grounds that FERC had abdicated its statutory responsibility under the NGA to protect shippers. Those requests were denied by the Commission on March 16, 1993. FERC March 16 Order, 62 FERC ¶ 61,243.

Indicated Expansion Shippers filed a timely petition with the U.S. Court of Appeals for the District of Columbia Circuit seeking review of the series of FERC orders in the *Pacific Gas Transmission Company* proceeding. These petitioners argued to the Court that FERC abdicated its obligations to interstate shippers of natural gas on the mistaken basis that the source of the discriminatory practices inhibited its authority or ability to protect interstate shippers. Petitioners' brief also argued that FERC could have stopped short of halting construction if it adopted other remedies that would equally protect interstate shippers from the effects of the undue discrimination.

In separate petitions for review of the FERC Orders that were ultimately consolidated with the review proceeding initiated by Indicated Expansion Shippers, both PGT and CPUC contended that by imposing the rate of return condition FERC had exceeded its jurisdiction and that the findings of anticompetitive or unduly discriminatory acts are unsupported by the record.

In its opinion disposing of the consolidated cases, the U.S. Court of Appeals did not reach the issues raised by Indicated Expansion Shippers. Similarly, it did not determine whether the PGT-PG&E arrangement was unduly discriminatory. The sole basis upon which the Court's opinion rested was that FERC had overstepped its jurisdictional bounds as stated in the Hinshaw Amendment to the NGA.

REASONS FOR GRANTING CERTIORARI

I. The U.S. Court of Appeals for the District of Columbia Circuit Has Decided An Important Question of Federal Law In This Case Which Has Not, But Should Be, Settled By The Supreme Court.

A. Summary of Argument

This case presents a fundamental jurisdictional conflict between federal and state authority. Specifically, it addresses the scope of FERC's authority under Sections 4,5, and 7 of the NGA, 15 USC §§ 717c, 777d and 717f, to consider the jurisdictional ramifications upon interstate natural gas shippers of state actions taken under color of the Hinshaw Amendment, as set forth in section 1(c) of the NGA. Similar issues were recently presently to the U.S. Court of Appeals for the District of Columbia Circuit in *United Distribution Companies, et al. v. FERC,* 319 U.S. App. D.C. 42, 88 F.3d 1105 (D.C. Cir. 1996) (*"United Distribution"*), wherein the Court upheld FERC's NGA authority where it conflicted with a claimed Hinshaw exemption, reaching a result directly opposite to that reached by the Court in this case.[1] In light of the importance of the question of Federal law presented by this case, the conflict of decisions within the District of Columbia Circuit on this issue, the "murkiness" of the issue, and the unprecedented resolution of the issue by the Circuit Court in this case, IES respectfully petition's the Supreme Court to issue a writ of certiorari to the Circuit Court below in order to fully and clearly resolve the

[1] A petition for rehearing and suggestion for rehearing en banc was filed by LDC Petitioners in *United Distribution Companies* on August 30, 1996, in response to the Circuit Court's per curiam opinion issued July 16, 1996, which determined that FERC appropriately asserted jurisdiction over LDC transactions involving release of interstate pipeline capacity. The challenge raised by LDC petitioners was whether the Circuit Court properly interpreted the scope of the Hinshaw Amendment. In support of their position, the petitioners cited the Circuit Court's opinion in this case, to the effect that matters involving a Hinshaw pipeline are "off-limits to the FERC."

current uncertainty in the natural gas industry regarding the delineation between Federal and State regulatory authority under the Hinshaw Amendment to the NGA.

Since the enactment of the Hinshaw Amendment in 1954, the courts and FERC have continued to define the demarcation between Federal and State jurisdiction, and to determine when State authority is preempted by the broad powers mandated by the NGA.[2] As both the *Altamont* and *United Distribution* cases make clear, the tension between State and Federal authority has been exacerbated by Federal and State policy initiatives which have promoted open access transportation services, brokering and transferring of capacity rights, and pipeline expansions. Both of these cases attempt to define the scope of Federal/State authority when those jurisdictions intersect or conflict, and yet both reach different conclusions. Conflict continues to abound at the FERC as well. In a very recent case which also sought to define FERC's authority in light of a Hinshaw exemption, one commissioner called the law in this area "admittedly murky."[3]

The Circuit Court in *Altamont* concluded that PG&E's Hinshaw status prevents the FERC from considering the effects of a state regulation:

> Although the Commission ordinarily has the authority to consider a matter beyond its jurisdiction if the matter affects jurisdictional sales—at least if there would otherwise be a regulatory gap—here there is no

---

[2] *See*, e.g., *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963); *Louisiana Power & Light Co. v. FPC*, 483 F.2d 623 (5th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974); *Public Utilities Commission of California v. FERC*, 900 F.2d 269 (D.C. Cir. 1990).

[3] *See Union Pacific Fuels, et al. v. Southern California Gas Company*, 76 FERC ¶ 61,300 (September 19, 1996), Commissioner Hoecker *dissenting in part.* In *Union Pacific*, the Commissioner rejected an argument, relying on Southern California Gas' Hinshaw status, that a charge levied by SoCal on interstate shippers was not within FERC's interstate jurisdiction.

> such gap but, on the contrary, an express congressional reservation of jurisdiction to another body. That places the matter off-limits to the FERC.

Altamont, 92 F.3d at 1248.

Petitioners respectfully submit that by defining FERC's NGA jurisdiction so narrowly, the Hinshaw exemption so broadly, and the crossover ban so mechanically, the Circuit Court has significantly reduced FERC's ability to protect interstate shippers subject to its jurisdiction. As a result of the Circuit Court's opinion, the balance between State and Federal regulation has been fundamentally altered. As a result of the Circuit Court's opinion, FERC is stripped of its ability to even consider the consequences on interstate shippers of natural gas simply by virtue of the source of those consequences. The logical, yet incongruous, outcome of this theory is that the Hinshaw exemption is so inclusively insulative that a Hinshaw pipeline and/or its State regulatory body could promulgate any variety of policies antithetical to the rights of interstate shippers, and by clothing those policies in the guise of "rate design", remain "off-limits" to FERC consideration. The Circuit Court's opinion thus leaves interstate shippers bereft of the protections accorded by the Natural Gas Act under Sections 4,5, and 7 and should be reviewed by the Supreme Court.

B. The Decision of the Circuit Court Is Unprecedented and Misconstrues the Scope of the Hinshaw Amendment to the Natural Gas Act

The Circuit Court's decision renders FERC powerless to protect interstate shippers of natural gas from unduly discriminatory and anticompetitive conditions if those conditions are imposed by a State agency in the guise of "rate policies" regarding a Hinshaw pipeline. Indeed, the decision goes so far as to prohibit FERC from even considering whether the result of the State's action frustrates its interstate jurisdiction—the entire matter is "off limits". This holding is without precedent and inverts the balance of power over interstate natural gas transportation intended by the Natural Gas Act.

As characterized by the Circuit Court, the "pivotal question" in this case is "whether the Commission may exercise its power over and interstate pipeline in a manner intended to influence a state agency's regulation of a Hinshaw pipeline". *Altamont*, 92 F.3d at 1247. Petitioners fundamentally disagree with the Circuit Court's characterization of the central issue of this case as a matter of analyzing the motive or intent of FERC. Rather, the central issue here is better characterized as delineating the permissible scope of FERC's consideration of the impact of nonjurisdictional transactions on matters clearly within the scope of FERC's jurisdiction, the issuance of a certificate of public convenience and necessity under Section 7 of the Natural Gas Act, 15 U.S.C. § 717f. The nonjurisdictional transaction involved here is a regulatory order of the CPUC directed at PG&E, an entity FERC found to be a Hinshaw pipeline. However, the subject matter of that regulatory order encompasses, and is specifically designed to affect, interstate shippers of natural gas utilizing the PGT Expansion facility, the jurisdictional facility that was the subject of PGT's Section 7 application before the FERC. Thus, the question is whether FERC can consider the unduly discriminatory impact of the CPUC order on interstate shippers utilizing the jurisdictional PGT facility. As is more fully discussed below, the issue concerning the specific remedial action taken by FERC based on that consideration is an entirely separate matter that does not affect the question of FERC's jurisdiction presented in this case.

Nevertheless, the Circuit Court recognized that, even as characterized in its decision, the answer to the "pivotal" issue in this case can and should be readily discerned from a proper interpretation of the Supreme Court's decision in *FPC v. Conway Corp.*, 426 U.S. 271 (1976) (*"Conway"*), as was argued by FERC. However, in addition to mischaracterizing the "pivotal" issue in this case, the Circuit Court rejected FERC's central argument by subjecting *Conway* to a misdirected interpretation. When discussing FERC's authority to consider the jurisdictional implications of nonjurisdictional transactions, the Circuit

Court, citing *Conway,* stated that "it could only do so '[if] the undue preference or discrimination is . . . traceable to the level of the jurisdictional rate.'" *Altamont,* 92 F.3d at 1247 (quoting Conway, 426 U.S. at 277). This selective use of language from Conway results in a very narrow interpretation of FERC authority in this context. However, a fuller reading of what the Supreme Court actually stated results in a very broad interpretation of Commission authority.

> If the undue preference or discrimination is *in any way* traceable to the level of the jurisdictional rate, it is plain enough that the section would to that extent apply; and to that extent the Commission would have power to effect a remedy under § 206 by an appropriate order directed to the jurisdictional rate.

Conway, 426 U.S. at 277 (emphasis added).

Thus, *Conway* held that FERC was within its authority to consider nonjurisdictional matters as long as the undue discrimination was traceable "in any way" to FERC's jurisdictional rates, a critical phrase, broadly construing FERC's authority, that the Circuit Court's decision literally deletes. In this case, the crossover ban was *explicitly aimed at gas arriving at Malin under PGT's Expansion firm rate schedule,* a linkage that more than satisfies the Supreme Court's requirements in *Conway.* Thus, the only question left unanswered by *Conway,* and the issue the Circuit Court did not address, is whether the rationale of *Conway* is equally applicable when the nonjurisdictional matter at issue is a State regulatory agency order directed at a Hinshaw pipeline. It is that issue, whether the Hinshaw Amendment precludes FERC consideration of the impact of a state regulatory order directed at a Hinshaw pipeline that imposes undue discrimination on interstate shippers utilizing a jurisdictional facility seeking a certificate of public convenience and necessity, that has not been previously addressed by the Supreme Court, and on which Petitioners now base this petition for a writ of certiorari.

After disposing of *Conway* and its clear impact on the "pivotal" issue in this case, the Circuit Court's principal authority for this ground breaking decision, already seized upon by State regulated entities in their arguments before the Circuit Court in *United Distribution*, is nothing more than what it characterizes as "a logical implication" arising from language in *ANR Pipeline Co. v. FERC*, 876 F.2d 124, 132 (D.C. Cir. 1989) ("*ANR*"), which the Circuit Court claims puts the Supreme Court decision, *FPC v. Transcontinental Gas Pipe Line Co.*, 365 U.S. 1 (1961) ("*Transco*"), "in perspective".

> [I]n Transco, despite the sale's impact on jurisdictional sales, no . . . agency had any direct voice over whether it satisfied the public interest. We think it would be a considerable stretch from there to say that, in certifying transportation that is necessary to carry out a sale, the Commission is required to reconsider the very aspects of the sale that have been assessed by an agency specifically vested by Congress with authority over the subject.

Altamont, 92 F.3d at 1247-1248 (quoting ANR, 876 F.2d at 132)

Petitioners believe that the Circuit Court entirely misconstrued ANR.. First, the Circuit Court conceded that the cited language is "couched in terms of what the Commission is required to consider", rather than what it is strictly prohibited from considering. *Id.* at 1248. More importantly, the entire subject matter of *ANR* relates to whether FERC is required to reconsider the exact same issues that were previously considered by another arm of the U.S. Department of Energy. *ANR* does not address, nor is it "logical" to extend *ANR* to a radically different context of conflicting Federal-State jurisdiction. It is not logical, or supportable, to conclude from *ANR* that FERC is absolutely prohibited from considering the entirely different issue relating to the jurisdictional impact on interstate shippers

of State policies.[4] In fact, on this latter point, the Circuit Court in ANR was quite clear:

> [W]e do not understand FERC to suggest that it would not independently examine any effects claimed to be due to the specific transportation proposed, as opposed to effects inherent in the importation and sale of the gas in the United States as a whole. Indeed, in this very case the Commission has shown alertness to the implications of the specific transaction, limiting the duration of the transportation certificates because of concern over their anticompetitive potential.

ANR, 876 F.2d at 132.

Far from supporting the Circuit Court's unprecedented conclusion limiting FERC's authority to consider the jurisdictional impact of matters reserved to other jurisdictions, ANR supports FERC's authority to "independently examine any effects claimed to be due to" the crossover ban. Accordingly, ANR does nothing to limit the applicability of the essential holding in *Transco*. The essential holding in *Transco* is that "the Commission's power under Section 7 to consider the public interest when deciding whether to issue a certificate for jurisdictional facilities extends generally to all factors bearing on the public interest, and specifically extends to permit FERC to look into matters excluded from the Commission's direct regulatory jurisdiction". *Office of Consumers Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980).

---

[4] Petitioners have attempted to clearly distinguish their position with respect to the jurisdictional issue at stake in this case from the specific action FERC took. The issue of FERC's authority to consider the matter is itself distinct form whether FERC may use the fruits of that consideration to "induc[e] a change [of state] policy". The latter it may not do. The former, it must.

Similarly, there is no authority for the proposition that Congress, in expressly reserving certain matters to the states through the Hinshaw Amendment, intended to in any way nullify FERC's ability to consider jurisdictional consequences that lie at the core of its regulatory authority, any more than FERC is prohibited from considering the jurisdictional impacts of matters over which it never had authority. See, e.g., *Maryland People's Counsel v. FERC*, 761 F.2d 780, 786-787 (D.C. Cir. 1985). While it may be true that if the source of the unduly discriminatory practices is a State agency action with regard to a Hinshaw pipeline, FERC's ability to directly rectify the matter is limited, FERC nevertheless retains all the jurisdiction that is required over interstate shippers to fashion an appropriate remedy to counter otherwise unduly discriminatory practices. As FERC recently stated, "[t]he Hinshaw exemption exempts from Commission jurisdiction the person receiving the gas within the state, not the person delivering the gas." *Union Pacific Fuels, Inc. v. Southern California Gas Company*, 76 FERC ¶ 61,300 at p. 62,496 (Sept. 19, 1996).[5]

C. The Decision of The Circuit Court Inverts Federal Preemption Law And Does Violence To The Supremacy Clause of the U.S. Constitution

The very circumstances of this case demonstrate the dangerous inversion of Federal/State regulatory authority inherent in the Circuit Court's decision. FERC had previously found that the tying of specific interstate and intrastate capacity unlawfully discriminated against interstate shippers. Accordingly, it ordered the projects untied by requiring PGT to delete those provisions of its tariff and to hold a new open season for capacity that would allow interstate shippers the right to deliver

---

[5] In *Union Pacific*, a case very analogous to this case, FERC found that an interconnection charge levied by a Hinshaw pipeline, Southern California Gas Company, and approved by the State regulatory body, the CPUC, against interstate shippers moving gas over the Kern/Mojave interstate pipeline was *not* jurisdictional to the CPUC by virtue of the Hinshaw exemption accorded to SoCal Gas, but was within the scope of FERC's jurisdiction over the interstate transportation of natural gas. *Id.*

gas at Malin, Oregon without any additional obligation to take capacity within California on the PG&E Expansion. In direct response to FERC's ruling, the CPUC adopted the crossover ban, which FERC properly found retied the projects, thereby reimposing the same unduly discriminatory condition FERC had previously rejected in another form. According to the Circuit Court, the fact that the same unduly discriminatory result was achieved through state action *completely removes the matter from FERC's consideration*. Thus, the Circuit Court's decision elevates form over substance to the detriment of interstate shippers who are completely dependent upon the Federal government to shield them from unduly discriminatory conditions affecting interstate natural gas transportation.[6]

Moreover, the Circuit Court's determination in this case is at odds with the Circuit Court's conclusion in *United Distribution Companies*. There, the Circuit Court determined that FERC's preclusion of the CPUC-approved "buy-sell" programs was proper because it was "grounded in the [transportation] transaction itself" and that FERC's authority preempted the state approved programs which conflicted with that jurisdiction. *United Distribution Companies*, 88 F.3d at 1157. Yet, here, where FERC's concern that interstate transportation not be encumbered or tied to other obligations was also unquestionably "grounded in the transportation transaction"governed by FERC, the Circuit Court concluded that FERC is precluded by law from even considering the matter.

---

[6] Petitioners agree with the Circuit Court that FERC could have "avoided any Hinshaw constraint upon its jurisdiction by concluding that PGT and PG&E undertook this project as a single company", a proposition for which there was more than sufficient evidence. The Circuit Court, however, fails to acknowledge that there is *any other more limited means* by which the Commission may take cognizance of the fact that "[t]he dual regulatory process is being taken undue advantage of by the utility, thwarting the intended balance of federal and state regulation." *City of Mishawaka v. American Electric Power Co., Inc.*, 616 F.2d 976, 983 (7th Cir. 1980).

This result is not only conflicting, but stands starkly outside the mainstream of legal precedent on this issue. As was recognized by the Circuit Court in as recent a case as *United Distribution Companies*, the Hinshaw Amendment, while carving out an area of exclusive State regulatory authority, does not overturn fundamental precepts of Federal preemption of conflicting State law under the Supremacy Clause of the Constitution. *Id.* 88 F.3d at 1155-1157. Certainly, the weight of precedents cited by FERC and IES support this view. *See Maryland People's Council v. FERC*, 761 F.2d 780 (D.C. Cir. 1985); *FPC v. Conway Corp.*, 426 U.S. 271 (1976); *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961); *Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378 (1959); *Panhandle Eastern Pipeline Co. v. FPC*, 324 U.S. 635 (1945). However, although the Circuit Court did not specifically so hold, the manner in which the decision has been applied creates an area of the law wherein *State regulation preempts conflicting Federal regulatory directives*.

Accordingly, Petitioners respectfully submit that the interpretation of the Circuit Court in *Altamont* places a judicial gloss on the Hinshaw Amendment whereby it completely inverts established principles of Federal preemption law. As such the decision elevates a statutory provision that was intended to be an exception to Federal preemption, to the level of a provision that broadly reverses Federal preemption law, thereby overriding the otherwise applicable effects of the Supremacy Clause of the U.S. Consitution. *This was not the intent of Congress in enacting the Hinshaw Amendment*[7] and should not be institutionalized by the Circuit Court's decision in this case.

The Circuit Court decision raises a serious question as to the reasonable limits of interpreting the scope of a statutory exception to the Supremacy Clause of the U.S. Constitution. *Compare Illinois Commerce Commission v. Interstate Commerce*

---

[7] *See* S. Rep. No. 817, 83rd Cong., 1st Sess, 2 (1953), *reprinted in* 1954 U.S. Code Cong. & Admin. News 2101, 2103; *See also ANR Pipeline Co. v. FERC*, 71 F.3d 897, 903 (D.C. Cir. 1995).

Commission, 749 F.2d 875 (D.C. Cir. 1984). To the extent this precise issue has not previously been specifically addressed by the Supreme Court, the precedent established by the decision of the Circuit Court in this case creates such conflict and confusion in this critical area of the law that it is indeed appropriate and desirable that the Supreme Court clarify this point in this case.

D. The Crossover Ban is Not a Mere "Bookkeeping Convention", But a Device By Which A State Regulatory Body Has Preempted Federal Regulation

The Circuit Court appears to rely heavily, if not exclusively, upon its characterization of the crossover ban as a mere "bookkeeping" matter that was part and parcel of "PG&E's rate design" as the essential predicate to its determination that the matter was "off-limits" to FERC's consideration. Petitioners respectfully submit that the description of the crossover ban is not the issue—the issue is the effect upon interstate shippers of the crossover ban. The effect of the crossover ban on interstate shippers is to impose upon them an additional and unduly discriminatory obligation downstream of the terminus of the interstate system. It is in that sense that the Circuit Court's characterization of the crossover ban as a bookkeeping convention or an element of PG&E's rate design obscures its repercussions on interstate commerce.

While the Circuit Court is correct when it states that under the CPUC's rate design, "a new user is billed at the rate applicable to the new facilities while an existing user is billed at the rate applicable to existing facilities", a rate policy with which Petitioners do not take issue, the Circuit Court fails to apprehend that what distinguishes the crossover ban from this rate policy, what makes the crossover ban independent of this rate policy, is the *absolute requirement that interstate shippers of natural gas in the PGT Expansion must become "new users" of PG&E's facilities*.

As FERC stated in its brief to the Circuit Court, "[t]he crossover ban undeniably ties the PG&E expansion and the

PGT expansion; that is its express purpose. It tied the two services together as surely as did PGT's original tariff and contracts with shippers". FERC Brief at p. 36. This tying, FERC found, meant that "PGT shippers will not be able to *use PGT freely*." 56 FERC ¶ 61,192 at p. 61,725. It "has the same anticompetitive effects as an interstate pipeline's refusing to untie or unbundle its transportation services from its sales services", and reveals "practices that deny transportation access in an unduly discriminatory manner". 57 FERC ¶ 61,097 at p. 61,361.

This issue—the tying of interstate and intrastate capacity—is totally distinct from rate design issues such as incremental and postage stamp rates. Petitioners have not challenged here the CPUC's right to allocate costs of new facilities to the new users of those facilities, or to require shippers to pay a single rate for the use of the facilities, whether the service is for one mile or four hundred miles. To the extent the Circuit Court reads FERC as challenging those policies, the Circuit Court was correct to find FERC overstepping its bounds. Those matters clearly lie at the heart of the state's jurisdiction.

The relationship between the crossover ban and the CPUC's rate design policies is, in its most favorable light, explicitly attenuated, and in reality, nonexistent: "without a requirement such as the crossover ban, some incremental volumes would migrate to existing facilities' thereby circumventing the policy underlying the incremental rate structure." This assertion made by the CPUC is, and always has been a *non sequitur*. The CPUC's incremental rate design policy, as the Circuit Court has correctly characterized it, "assures that Expansion customers, for whose benefit the new facilities were constructed, pay the cost of those facilities". If IES shippers choose to become PG&E Expansion customers, then they should and will pay the cost of those facilities. On the other hand, if IES members sell their gas at the Malin delivery point, just as other non-PGT Expansion shippers do, they will not become PG&E Expansion customers. The whole point of the crossover ban was to force PGT Expansion shippers to become

customers of the PG&E Expansion over their objections.[8] This is neither a legitimate element of a rate design nor a bookkeeping convention.

No manner of description, however benign, can alter the inescapable conclusion that the crossover ban imposes on PGT Expansion shippers, solely by virtue of their being interstate shippers, a separate and additional obligation to pay for intrastate facilities neither contracted for nor wanted. The Circuit Court decision has the unfortunate effect of allowing a State to clothe its actions in the rubric of rate design, and however hollow the claim, completely shield itself from FERC's consideration of the effect of those actions on its jurisdiction over the interstate transportation of natural gas. Where, as here, the result of the State's act was to directly negate a prior Federal requirement that the transportation of interstate natural gas shall not be encumbered with any additional downstream obligations solely by virtue of the specific interstate transportation provided, and that Malin, Oregon must be a true, not a fictional delivery point, FERC was not only within its authority to consider the matter, it was obligated to do so.

By this device the CPUC, with the blessing of the Circuit Court, has instituted a practice by which State regulatory agencies can preempt clear and specific Federal regulatory directives based upon Federal statutory regulatory standards. Certainly, FERC should not be permitted to do indirectly what it could not do directly in contravention of the Hinshaw Amendment, attempt to dictate CPUC rate design policy. However, Petitioners urge the Court to clearly explain the import of its prior decisions construing FERC's jurisdiction under the NGA, the Hinshaw Amendment and their relationship to Federal preemption law under the Supremacy Clause. That is, the CPUC should not be able to do indirectly what it could not do directly,

---

[8] PG&E was at risk for the recovery of the costs associated with the PG&E Expansion. PG&E considered the crossover ban essential to assure itself that those revenues were recovered.

override Federal regulatory policy concerning the nondiscriminatory interstate transportation of natural gas. *See Schenidwind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Northwest Central Pipeline v. State Corp. Comm'n*, 489 U.S. 493, 512 (1989) ("Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other.").

E. The Circuit Court Decision Reverses An Inappropriate Remedy Ordered By FERC By Allowing State Preemption of Federal Statutory Protections For Interstate Natural Gas Shippers

Petitioners agree with the Circuit Court's conclusion that FERC may not adopt a remedy with the intent to "influence a state agency's regulation of a Hinshaw pipeline." As noted above however, this failure on the part of FERC does not lead to the conclusion that FERC failed by considering the matter in the first instance. As the Commission stated, in the absence of a proper condition, it could not find that the certification application met the public convenience and necessity. That the Commission ultimately imposed an improper condition—one directed to influence the CPUC rather than directed to protecting interstate shippers—does not affect FERC's obligation to consider the unduly discriminatory condition in reaching its fundamental finding on public convenience and necessity. Petitioners respectfully submit that the Circuit Court failed to distinguish FERC's underlying responsibility from the means by which it regrettably chose to enforce it.

It is the position of Petitioners, argued extensively in its briefs below, that it is the Commission's absolute duty to "stamp out" undue discrimination where it is found to exist.[9] If the Commission is prevented from stamping it out because it was imposed by a State agency upon a Hinshaw pipeline, it must nonetheless ensure that those shippers that would otherwise be

---

[9] *Associated Gas Distributors v. FERC* (AGD I), 824 F.2d 981 (D.C. Cir. 1987).

harmed by the unduly discriminatory practices are fully protected if it is to find a certificate application to be in the public convenience and necessity. While Petitioners believe that the FERC August 1 Order remedy— preventing construction until FERC could make a finding that shippers would not face unduly discriminatory practices—was lawful, it was not the only means by which the Commission, then or now, could protect shippers.[10]

However, the Circuit Court went far beyond preventing FERC from imposing an unlawful remedy for the unduly discriminatory practices it found to exist. It precluded FERC from any consideration of the impact of CPUC directives. This wholesale abnegation of FERC's authority to protect interstate natural gas shippers from undue discrimination by Hinshaw pipelines reverses the central precept underlying the preexisting balance between State regulatory authority under the Hinshaw Amendment to the Natural Gas Act and Federal regulatory authority over the interstate movement of natural gas under that same act. That central precept must be that Federal regulatory authority, validly based upon the Commerce Clause of the Constitution, must preempt conflicting State regulatory authority by operation of the Supremacy Clause of the Constitution, and specific statutory exceptions to that preemption, such as the Hinshaw Amendment, should not be construed so broadly so as to create an exception that swallows the rule.

---

[10] *See Plaquemines Oil and Gas Company v. FERC*, 450 F.2d 1334, 1337-1338 (D.C. Cir. 1971) (The Commission has the "equitable power "to regard as being done that which should have been done' by recreating the past, insofar as is reasonably possible, to reflect compliance with the Act and to order refunds to be paid if necessary to achieve that goal.").

II. Conclusion

For the foregoing reasons, Petitioners pray that this Honorable Court issue a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

Roger A. Berliner, Esq.
John M. Binetti, Esq.
Brady & Berliner, P.C.
1225 Nineteenth Street, N.W.
Suite 800
Washington, D.C. 20036
Attorneys for Petitioners
Indicated Expansion Shippers
(*Counsel of Record)

Dated: January 22, 1997

Appendix 1

Decision of the U.S. Court of Appeals

United States Court of Appeals

DISTRICT OF COLUMBIA CIRCUIT

Argued Nov. 14, 1995. Decided Aug. 23, 1996

No. 91-1369

ALTAMONT GAS TRANSMISSION COMPANY, ET AL.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

GREAT LAKES GAS TRANSMISSION LIMITED PARTNERSHIP,
Intervenor

Consolidated with
93-1241, 93, 1295, 93-1308, 93-1309 and 93-1317

On Petitions for Review of an Order of the Federal Energy Regulatory Commission.

Roger A. Berliner, Washington, DC, argued the cause for petitioners Indicated Expansion Shippers and *Frederic G. Berner, Jr.*, Washington, DC, argued the cause for petitioners Altamont Gas Transmission Company, et al., with whom *Jane E. Stelck* and *James F. Bendernagel, Jr.*, Washington, DC, for petitioners Altamont Gas Transmission Company, et al., *Thomas D. Oliver*, Houston, TX, for petitioner Chevron U.S.A. Inc., and *John Leslie,* for PanCanadian Petroleum Company, et al., were on the joint briefs. *David R. Stevenson*, New Orleans, LA, entered an appearance for petitioner Chevron U.S.A. Inc.

Mark Fogelman, San Francisco, CA, argued the cause for petitioner Public Utilities Commission of the State of California, with whom *Edward W. O'Neill* was on the briefs.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Michael F. McBride, Washington, DC, argued the cause for petitioner and intervenor Pacific Gas Transmission Company, with whom *Elias G. Farrah, Bruce W. Neely, Washington, DC, Keith T. Sampson, Portland, OR, Joseph H. Fagan* and *Michael J. McDanold*, Washington, DC, were on the briefs. *Jack F. Fallin, Frank R. Lindh, Howard V. Golub, Patrick G. Golden, David W. Anderson*, San Francisco, CA, and *Raymond N. Shibley*, Washington, DC, entered appearances.

Timm L. Abendroth, Federal Energy Regulatory Commission, argued the cause for respondent, with whom *Jerome M. Feit*, Solicitor, and *Randolph L. Elliott*, were on the brief. *William S. Scherman*, Washington, DC, entered an appearance.

James C. Moffatt, Shippen Howe and *John R. Staffier*, Washington, DC, entered appearances for intervenors Foothills Pipe Lines Ltd., et al. *David L. Huard*, Los Angeles, CA, entered an appearance for intervenor Southern California Gas Company.

Thomas B. Magee, Washington, DC, *Frederick T. Kolb*, New Orleans, LA, and *Jon L. Brunenkant*, Washington, DC, entered appearances for intervenors Amoco Production Company and Amoco Canada Petroleum Company Ltd. *Kenneth L. Glick* and *Narinder J. Kathuria*, Detroit, MI, entered appearances for intervenor Great Lakes Gas Transmission Limited Partnership. *Jennifer B. Corwin*, Washington, DC, entered an appearance for intervenor Southern California Edison Company. *Britton White, Jr.*, El Paso, TX, *Charles G. Fox*, Albany, NY, *Mark F. Sundback*, Washington, DC, and *Phillip D. Endom*, El Paso, TX, entered appearances for intervenor El Paso Natural Gas Company.

Thomas D. Clarke, Oakton, VA, entered an appearance for intervenor Pacific Interstate Transmission Company. *David P. Yaffe*, Los Angeles, CA, entered an appearance for intervenor Northern California Power Agency. *Norman A. Pedersen*, Los Angeles, CA, entered an appearance for intervenors Southern California Utility Power Pool and Imperial Irrigation District. *Keith L. Kutler*, Salem, OR, entered an appearance for intervenor Oregon Public Utility Commission. *David R. Stevenson* entered an appearance for intervenor Chevron U.S.A. Inc.

Before: GINSBURG, ROGERS AND TATEL, *Circuit Judges*.

Opinon for the court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: The Federal Energy Regulatory Commission authorized petitioner Pacific Gas Transmission to build and operate a pipeline from the Canadian border to the Oregon-California border at Malin, Oregon, where it connects to the intrastate facilities of PGT's parent, Pacific Gas & Electric. The California Public Utilities Commission, also a petitioner, authorized PG&E to expand its facilities in order to receive the new gas from PGT for distribution within California.

Because it determined that the rate structure proposed by PGT-PG&E discriminated against interstate shippers seeking access to the California market via PGT-PG&E's facilities, the Commission initially postponed the start of PGT's construction. In order to meet increased demand for gas, however, the Commission subsequently authorized PGT to begin construction but lowered the pipeline's allowed rate of return to 10.13% from 12.75% until PGT could demonstrate that its rates and policies no longer discriminated against interstate shippers.

Petitioners Altamont Gas Transmission and other interstate shippers (collectively, the Expansion Shippers), which compete with PG&E to sell gas in California, support the Commission's exercise of jurisdiction in this case. They contend, however, that the PGT-PG&E arrangement is unduly discriminatory; the Commission should not have certificated PGT's expansion in its present form; and the rate of return adjustment ordered by the Commission is arbitrary and capricious.

Both PGT and the CPUC contend that by imposing the rate of return condition the Commission exceeded its jurisdiction, and they deny that the CPUC's rate orders sanction anticompetitive or unduly discriminatory acts. For its part, PGT supports the Commission's decision to lift the original construction ban but argues that the rate of return condition is an unreasonable penalty that is unsupported by the record and unconnected to PGT's allegedly discriminatory acts.

We hold that the Commission did indeed overstep its jurisdictional bounds, interfering in an area that the Congress has expressly reserved to the states. Accordingly, we do not decide whether the PGT-PG&E arrangement is unduly discriminatory, nor whether the Commission should have certificated PGT's expansion in its present form, nor whether the Commission's decision to adjust PGT's rate of return is arbitrary and capricious.*

I. Background

In January 1991 the Commission preliminarily authorized PGT to build and operate a pipeline from the Canadian border to Malin, Oregon, subject to two conditions: First, PGT would have to offer its new transportation capacity to all shippers rather than allocate the bulk of the capacity to California utilities before offering it to interstate shippers. Second, PGT would have to revise its contractual relationships with the Expansion Shippers to eliminate a "tie-in" that required them to use PG&E's expansion facilities within California. The tie-in subjected the Expansion Shippers to circuitous routing and higher overall rates in order to transport their gas to its final

---

* We do have one housekeeping matter to resolve: PGT asks that a certain requirement in the Commission's January 1991 order be vacated as moot. The Commission initially directed PGT to use a 95% load factor in designing its usage charge. Later the Commission authorized PGT to use a demand-based rate design instead of a usage-based design. Thus PGT's load factor became a non-issue and, for that reason, the Commission did not vacate the requirement. The Supreme Court has held that a moot agency directive should be vacated in order to clear the path for relitigation and to remove an unreviewed judgment. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40, 71 S.Ct. 104, 106-07, 95 L.Ed. 36 (1950). The Commission, however, points out that PGT did not raise this issue in its request for rehearing of the August order. Instead, PGT simply asked the Commission to "clarify that this throughput component no longer exists." Therefore, asserts the Commission, PGT cannot raise the question on appeal. *See* 15 U.S.C. § 717r(b). Under the circumstances, this is an excessively fastidious reading of PGT's request for rehearing. We hereby vacate the load factor requirement.

destination. Expansion Shippers serving northern California could not take delivery of their gas at Malin; instead, they had to pay for transportation to PG&E's Kern River Station in southern California and then pay a separate charge on PG&E's intrastate system for transportation back to northern California.

The Commission agreed that once PGT satisfied the two conditions, it could proceed with construction under an approved rate structure that included a return on equity of 12.75%—not far from the midpoint of the 10.13-15.80% "zone of reasonableness." Subsequently, PGT did in fact comply with both conditions, altering its initial capacity allocation and making gas available for delivery at Malin by eliminating the contractual requirement that Expansion Shippers use PG&E's expansion facilities.

In August 1991 the Commission issued PGT a certificate, but the certificate did not authorize PGT to begin construction immediately. Rather, the FERC expressed continuing concern over decisions of the CPUC that, in the Commission's view, effectively perpetuated the tie-in between the new PGT pipeline and PG&E's expansion facilities. First, the CPUC had required the Expansion Shippers to use PG&E's expansion facilities before they could "cross over" to its pre-existing facilities. Second, the Expansion Shippers had to pay PG&E a flat (so-called postage stamp) rate for use of its expansion facilities regardless of the distance over which they shipped and then pay an additional demand charge to reserve delivery capacity on the existing system from Kern River to northern California (a so-called double backbone transmission charge). The Commission concluded that these state regulatory requirements embedded in PG&E's rate structure were anticompetitive, just as PGT's original contractual tie-in had been. The Commission refused to allow PGT to go forward with construction until the pipeline guaranteed nondiscriminatory treatment to interstate shippers.

PGT and several of its customers then requested that the Commission allow construction to begin so that PGT could meet the increasing market demand for gas. The CPUC also

asked the Commission to allow construction to proceed, but on the ground that the FERC could not lawfully condition PGT's certificate upon a change in PG&E's intrastate rates. The Expansion Shippers, however, opposed the Commission's lifting the condition until PGT provided assurance that the tie-in would be eliminated. In October 1991 the Commission permitted construction to go forward in order to satisfy the growing demand for gas but it reduced PGT's return on equity to 10.13%, the low end of the zone of reasonableness, until PGT eliminated undue discrimination against interstate shippers.

PGT, the CPUC, and Altamont, an interstate natural gas pipeline, all requested rehearing of the August order; PGT and the Expansion Shippers requested rehearing of the October order. In March 1993 the Commission denied all rehearing requests. Although the CPUC had by then eliminated the double backbone portion of PG&E's transmission charge, the Commission concluded that this change alone "d[id] not provide a sufficient remedy." The Commission expressed particular concern that, because of the crossover prohibition and PG&E's postage stamp rate, an interstate shipper that used PGT's new pipeline could not get the benefit of the lower rate PG&E charged for use of its pre-existing facilities even if capacity became available on those facilities. In conditionally lowering the return that PGT was authorized to earn on its new pipeline, the Commission hoped to "accommodate and balance conflicting objectives by permitting construction to go forward along with providing an appropriate incentive to continue to work to eliminate undue discrimination."

Section 7 of the Natural Gas Act, 15 U.S.C. § 717f, prohibits the construction of certain natural gas pipeline facilities without a certificate of public convenience and necessity issued by the Commission; section 7(e) authorizes the Commission "to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." PGT contends that the Commission exceeded its authority

under § 7(e) by conditioning PGT's certificate upon the pipeline earning the minimum reasonable rate of return, 10.13%.

The Hinshaw Amendment, § 1(c) of the NGA, 15 U.S.C. § 717(c), provides that intrastate rates and services, such as those of PG&E in this case, are exempt from Commission scrutiny. The amendment applies to any state-regulated pipeline that receives interstate gas "within or at the boundary of a state if all of the gas so received is ultimately consumed within such state." Both the CPUC and PGT argue that under the amendment the CPUC retains exclusive authority over the rates, services, and facilities of PG&E; accordingly, by conditioning PGT's certificate upon a change in PG&E's practices the Commission was attempting to do indirectly what it could not do directly.

In exercising its supervisory authority over PG&E's rates, the CPUC directed the company to adopt an incremental rate structure—that is, one in which the added cost of the expansion facilities is assessed against expansion customers only (as opposed to a "rolled-in" rate that recovers the cost of both old and new facilities from old and new customers alike). According to the CPUC, only the use of incremental rates assures that expansion customers, for whose benefit the new facilities were constructed, pay the cost of those facilities. As the CPUC points out, "[w]ithout a requirement such as the crossover ban, some incremental volumes would migrate to existing facilities" thereby circumventing the policy underlying the incremental rate structure. Finally, a postage stamp rate is equitable as applied to the shipments destined for northern California, according to the CPUC, because the expansion facilities would not have been built but for the need to serve the increased demand for gas in southern California; absent that demand, "[s]hippers wishing to deliver gas ultimately to northern California would have no means of bringing additional Canadian gas into the state."

The Commission acknowledges that an incremental rate structure allocates the cost of a new facility to the customers

who benefit from using it. On the facts of this case, however, the Commission suggests that an incremental rate structure would be unduly discriminatory because it would require interstate shippers to pay a higher rate for the intrastate expansion facilities than is warranted by the mileage they use. Therefore, the Commission wants PG&E to (1) adopt a rolled-in structure, or (2) eliminate the crossover ban, or (3) abandon its postage stamp rate in favor of a rate that varies with mileage. Because PG&E has not taken one or more of these steps, the Commission maintains that PG&E obtains an unfair advantage over interstate shippers that use PG&E's facilities but are also its competitors for sales in the California market. Because it pays a non-distance-sensitive rate, a shipper selling gas in northern California subsidizes the companies that serve the southern California market, which is further from Malin. That same shipper would also appear to be put at a competitive disadvantage relative to PG&E in northern California; the fixed rate the shipper pays for the use of PG&E's expansion facilities exceeds PG&E's cost (as reflected in the rate) for the use of its older facilities.

II. Analysis

As a threshold matter, the Commission contends that the CPUC does not have standing to seek review of the August and October 1991 orders. In the case of the August order the CPUC got what it wanted—the Commission lifted the construction ban that had been in effect against PGT—and in the case of the October order the CPUC did not seek rehearing, which is a jurisdictional prerequisite for judicial review. The CPUC responds that it challenged the August order with respect both to the construction ban and to the Commission's underlying finding of undue discrimination and, in this latter regard, that order continues to impede the CPUC in its exercise of regulatory authority. Additionally, the CPUC asserts that it is not required to seek rehearing of a supplemental order that leaves intact the pertinent parts of a prior order of which it did request rehearing.

We take no position on this question of standing. The CPUC asks for relief that is in all relevant respects congruent with the relief requested by PGT, and for the same underlying reason. Because we grant PGT's petition in sufficient part to give the CPUC all the relief it seeks, and because the other issues that the CPUC raises are not necessary to our disposition of this case, whether the CPUC has standing is of no consequence.

We begin our analysis of the Commission's jurisdictional bounds with an inquiry into the applicability of the Hinshaw Amendment to affiliated companies. Then we examine the principal contention of PGT and the CPUC—that the Commission interceded in an area expressly reserved to the states. Section 1(c) of the NGA, 15 U.S.C. § 717(c), is of course central to both questions. It provides in relevant part:

> The provisions of [the NGA] shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted . . . by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States.

A. The Applicability of the Hinshaw Amendment to Affiliated Companies

According to the Expansion Shippers, the PGT-PG&E pipeline is a single, integrated interstate transmission facility owned in part directly and in part indirectly by PG&E. When the CPUC required interstate shippers to use PG&E's expansion facilities before crossing over to its pre-existing facilities,

PGT and PG&E (with the help of the CPUC) were able to bifurcate their expansion project into an interstate component subject to regulation by the Commission and an intrastate component which evaded federal supervision. This duality sheltered PG&E from the competition of the interstate shippers notwithstanding that the "Congress did not intend the [Hinshaw Amendment] to relieve the Commission of jurisdiction over local branches of integrated interstate systems." *Louisiana Power & Light Co. v. FPC,* 483 F.2d 623, 633 (5th Cir.1973).

Altamont takes the position that, on the facts of this case, the Hinshaw Amendment does not even apply to PG&E. Because PGT and PG&E are effectively one and the same company (according to Altamont) their transfer of gas at the Oregon-California border does not satisfy the threshold requirement of s 717(c) that gas be received by one person "from another person."

The Commission, however, found that although the PGT-PG&E expansion was coordinated as to management, financing, and contracting, their integration in these areas did not make the two companies into one for the purpose of the NGA. In its August order, the Commission concluded that without proof of undue discrimination there is "nothing inappropriate about such coordinated activities," and Altamont did not demonstrate that the areas of coordinated activity were the source of such undue discrimination as the agency had identified.

In past decisions the Commission has arguably taken a harder look at nonjurisdictional services provided by the affiliate of an interstate pipeline. *See, e.g., Arkla Gathering Servs. Co.,* 69 FERC ¶ 61,280 at 62,087 (1994) (Commission may treat jurisdictional pipeline and nonjurisdictional gatherer as single entity where services are tied), *aff'd in relevant part, Conoco Inc. v. FERC,* 90 F.3d 536 (D.C.Cir.1996). In the recent case of *KansOk Partnership,* 73 FERC ¶ 61,160 (1995), the Commission held that it would treat three affiliated pipelines as a single interstate system because their corporate structure was

designed specifically to avoid federal regulation. *Id.* at 61,486. "[W]here it is necessary to protect the public interest," the Commission said, it "will disregard the separate corporate status of entities that would otherwise be considered nonjurisdictional." *Id.* at 61,484. Closer in point is another decision issued the same day as *KansOk*, in which the Commission found that three affiliates—including a Hinshaw pipeline—that had coordinated their construction proposals constituted an interstate pipeline subject to the NGA. *Louisiana Gas Sys. Inc.*, 73 FERC ¶ 61,161 (1995). The Commission indicated that the jurisdictional status of any one of the pipelines might not have been an issue, but because "the actual effect of the construction project contemplated here will be to give pipeline affiliates a competitive advantage in the transportation of gas . . . this would subvert the purposes of the NGA." *Id.* at 61,502. The Commission determined not to allow the companies "to balkanize into a chain of affiliates subject to the regulations of various states." *Id.* at 61,503.

Given a proper evidentiary record, the Commission might have avoided any Hinshaw constraint upon its jurisdiction by concluding that PGT and PG&E undertook this project as a single company. The Commission did not reach this conclusion, however, and the court cannot on this record hold that the Commission was unreasonable—that is, that PGT and PG&E unduly discriminated against interstate shippers by coordinating their activities. We are of course mindful that the Commission's choice not to pursue a given line of inquiry "often involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831, 105 S.Ct. 1649, 1655-56, 84 L.Ed.2d 714 (1985). We therefore treat PGT and PG&E as distinct companies, as did the Commission, for purposes of the Hinshaw analysis.

B. The Commission's Consideration of Nonjurisdictional Issues

Next we turn to the argument, advanced both by PGT and by the CPUC, that under the Hinshaw Amendment the Commission lacks the power to condition a certificate of public

convenience and necessity upon an interstate pipeline's intrastate affiliate changing its rate structure. We have held that the Commission may not use the conditioning authority of § 7(e) to circumvent a limitation imposed upon its ratemaking authority by §§ 4 and 5 of the NGA, nor *a fortiori* to do anything that is specifically proscribed by the Act. *American Gas Ass'n v. FERC*, 912 F.2d 1496, 1510 (1990) (*AGA*). *See also Northern Natural Gas Co. v. FERC*, 827 F.2d 779, 781 (1987) (en banc). The CPUC and PGT contend that the Hinshaw Amendment puts PG&E's intrastate rates outside the Commission's legitimate area of concern. Both PG&E's postage stamp rate and its crossover ban are, in effect, rate policies approved or required by the CPUC. The crossover ban is a bookkeeping, not an operating, convention; regardless how the gas flows through the existing and the expansion facilities, a new user is billed at the rate applicable to the new facilities while an existing user is billed at the rate applicable to existing facilities. That is why, as the Commission acknowledged, a rolled-in rate would render the crossover ban irrelevant.

Because they are elements of PG&E's rate design, both the postage stamp rate and the crossover ban are within the jurisdiction of the CPUC. Yet in its March 1993 order denying rehearing, the Commission described the CPUC's decision to eliminate the double backbone portion of PG&E's transmission charge while retaining both the postage stamp rate and the crossover ban as "not provid[ing] a sufficient remedy" to satisfy the FERC that PG&E's rates were not unduly discriminatory. Then, recognizing that it could not lawfully regulate PG&E's rates, the Commission moved indirectly but frankly to "induc[e] a change to a policy beyond [its] jurisdictional purview" by attaching a rate-of-return condition to PGT's certificate. Although the Commission has broad authority to consider all relevant factors in deciding whether and upon what terms to issue a certificate, the rate structure of an affiliated Hinshaw pipeline is not a relevant factor. On the contrary, in § 717(c) the Congress expressly withdrew it from the purview of the agency.

In *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 467, 70 S.Ct. 266, 268, 94 L.Ed. 268 (1950), the Supreme Court held that a company receiving gas at a state border from an interstate pipeline and transporting that gas for sale within the state is engaged in interstate commerce subject to the NGA. The Hinshaw Amendment was intended to overrule *East Ohio* in part by foreclosing Commission jurisdiction over the rates, services, and facilities within the state where the gas is finally consumed—they are "declared to be matters primarily of local concern"—so long as a state regulatory authority assumes such jurisdiction. According to the CPUC, the appropriate way for the Commission to assert its interests is therefore to appear before the CPUC, just as the CPUC appears before the FERC in matters within the Commission's jurisdiction. Alternatively, the Commission may institute federal-state cooperative procedures under 15 U.S.C. § 717p(b). The Commission took neither course here.

The Commission counters that its action was confined to lowering the rates charged by PGT for interstate transportation—clearly a subject matter within its jurisdiction. The agency asserts that it simply created an incentive (by conditionally reducing PGT's rate of return) for the CPUC and PG&E to behave in a manner that advances the public interest, *i.e.*, to revise PG&E's rate structure. *See AGA*, 912 F.2d at 1511 (Commission may "establish [ ] certificate conditions with an eye to inducing changes in transactions that are beyond its direct grasp"). According to the Commission, while the Hinshaw Amendment restricts its "primary grant of jurisdiction over interstate transportation and sales for resale," it does not restrict the Commission's authority to consider a nonjurisdictional matter—even one subject to state regulation—if it is relevant to an issue within its immediate domain. *See, e.g., Maryland People's Counsel v. FERC*, 761 F.2d 780, 786-87 (D.C.Cir.1985) (Commission may consider anticompetitive effect of nonjurisdictional activity).

The Commission invokes two Supreme Court cases in support of its position. In *FPC v. Transcontinental Gas Pipe Line*

Co., 365 U.S. 1, 81 S.Ct. 435, 5 L.Ed.2d 377 (1961) (Transco), the Supreme Court upheld the Commission's denial of a certificate for transportation of gas to be sold at retail, although such sales are not subject to regulation by the Commission. The Court reasoned that the price at which the retail sales would be consummated might occasion an escalation in the price of certain wholesale transactions that were within the Commission's jurisdiction. *Id.* at 7, 81 S.Ct. at 438-39. In *FPC v. Conway Corp.*, 426 U.S. 271, 96 S.Ct. 1999, 48 L.Ed.2d 626 (1976), an electric utility engaged in both (jurisdictional) wholesale interstate sales and in (nonjurisdictional) industrial retail sales. Some of the utility's wholesale customers competed against the utility by reselling the gas to industrial users. These customers alleged that the wholesale price was inflated to prevent them from competing for the retail business. The Court held that the Federal Power Act authorized the Federal Power Commission to examine the entire factual context surrounding the wholesale rates, including facts related to the nonjurisdictional retail transactions. *Id.* at 280, 96 S.Ct. at 2005.

The pivotal question raised in the present case is not whether the Commission has jurisdiction over a Hinshaw pipeline—the Commission concedes that it does not—but whether the Commission may exercise its power over an interstate pipeline in a manner intended to influence a state agency's regulation of a Hinshaw pipeline. In *Conway* the Supreme Court precisely delineated the Commission's authority to explore the jurisdictional implications of a nonjurisdictional transaction; it could do so only "[i]f the undue preference or discrimination is . . . traceable to the level of the jurisdictional rate." 426 U.S. at 277, 96 S.Ct. at 2003-04. In this case the alleged anticompetitive pricing is traceable not to PGT's jurisdictional rate but to PG&E's nonjurisdictional rate. *Conway* provides the Commission no comfort at all.

As for *Transco*, the CPUC correctly characterizes it as a case in which the nonjurisdictional sale fell into a regulatory gap, not one in which the nonjurisdictional sale was regulated by an agency other than the Commission. As the Supreme

Court explained: "[W]hen we are presented with an attempt by the federal authority to control a problem [*i.e.*, an increase in the wholesale rates of an interstate natural gas pipeline] that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation." 365 U.S. at 28, 81 S.Ct. at 449-50. Our opinion in *ANR Pipeline Co. v. FERC*, 876 F.2d 124, 132 (1989), puts Transco in proper perspective:

> [I]n *Transco*, despite the sale's impact on jurisdictional sales, no . . . agency had any direct voice over whether it satisfied the public interest. We think it would be a considerable stretch from there to say that, in certifying transportation that is necessary to carry out a sale, the Commission is required to reconsider the very aspects of the sale that have been assessed by an agency specifically vested by Congress with authority over the subject.

Although *ANR* is couched in terms of what the Commission is required to consider, a logical implication is that when the Congress explicitly reserves jurisdiction over a matter to the states, as here, the Commission has no business considering how to "induc[e] a change [of state] policy" with respect to that matter. In any event, the Commission offers no contrary authority.

Instead, the Commission insists that it has merely lowered PGT's jurisdictional rates without intruding upon the authority of the CPUC. This claim rings hollow indeed. The Commission lowered PGT's return on equity specifically and only to "induc[e] a change to a policy beyond [its] jurisdictional purview," *i.e.*, to pressure the CPUC to regulate PG&E as the Commission desired but could not itself require. Under the circumstances, the Commission was indeed attempting to do indirectly what it could not do directly, that is, intercede in a matter that the Congress reserved to the State. *See Northwest Central Pipeline v. State Corp. Comm'n*, 489 U.S. 493, 512, 109 S.Ct. 1262, 1275, 103 L.Ed.2d 509 (1989) ("The NGA was

designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other").

III. Conclusion

In conceding that PG&E is a Hinshaw pipeline, the Commission expressly declined to look behind the pipeline company's corporate structure and to treat PG&E and PGT as a single company. We uphold that step as reasonable and must therefore hold that PG&E's California rates are exempt from the jurisdiction of the Commission. Although the Commission ordinarily has the authority to consider a matter beyond its jurisdiction if the matter affects jurisdictional sales—at least if there would otherwise be a regulatory gap—here there is no such gap but, on the contrary, an express congressional reservation of jurisdiction to another body. That places the matter off-limits to the FERC.

We therefore grant PGT's petition for review insofar as it challenges the Commission's authority under § 1(c) of the NGA, 15 U.S.C. § 717(c). Accordingly, we also dismiss as moot the petition filed by the CPUC (without resolving whether the agency has standing to complain) and we deny the petition filed by Altamont and the Expansion Shippers.

So ordered.

Appendix 2

FERC Orders

[¶ 61,243]

Pacific Gas Transmission Company Docket Nos. CP89-460-008, CP89-460-009, CP90-1-002 and CP90-1-003

Order Granting in Part and Denying in Part Requests for Rehearing and Clarification

(Issued March 16, 1993)

Before Commissioners: Elizabeth Anne Moler, Chair; Jerry J. Langdon, and Martin L. Allday.

This order addresses requests for rehearing and clarification of an August 1, 1991 order,[1] and an October 24, 1991 order.[2] The August 1, 1991 order issued a certificate authorizing Pacific Gas Transmission Company (PGT) to construct and operate a substantial expansion of its existing pipeline system (Expansion Project) and to provide firm interstate transportation service for various Expansion shippers, but prohibited construction until PGT demonstrated certain unduly discriminatory conditions had been eliminated. The October 24, 1991 order modified the August 1, 1991 order, permitting PGT to commence construction. This order grants in part and denies in part requests for rehearing and clarification.

Background

On December 8, 1988, PGT filed an application in Docket No. CP89-460-000, pursuant to section 7(c) of the Natural Gas Act (NGA), for a certificate to construct and operate its Expansion Project and to provide firm interstate transportation for certain large utility customers located in the Pacific Northwest and California. PGT requested authority to transport up to 710 MMcf per day of gas, on a firm basis, from Kingsgate, British Columbia. Under the proposal, approximately 150 MMcf per day of gas would be delivered on a firm basis to the Pacific Northwest and 600 MMcf per day of gas on a firm basis would

---

[1] 156 FERC ¶ 61,192 (1991).

[2] 57 FERC ¶ 61,097 (1991).

be delivered to an existing interconnection with Pacific Gas and Electric Company (PG&E) at Malin, Oregon.[3] The deliveries to California would be effected through an expansion of the PG&E system.

October 1989 Amendment

Subsequently, on October 3, 1989, PGT filed in Docket No. CP89-460-001 an amendment to its application to reflect the fact that capacity on the Expansion Project was fully subscribed through the execution of exclusive precedent agreements. PGT's amendment altered the design of the proposed facilities in order to increase the volumes delivered and to provide seasonal service. The revised facility proposal included 430 miles of 42-inch diameter looping on PGT's existing system, instead of the 36-inch diameter looping as proposed in its initial application. Under the amendment, PGT also planned to add additional delivery points in order to provide interruptible transportation service and to revise its proposed receipt and delivery points.

Offer of Settlement

On November 8, 1989, PGT filed in Docket No. CP89-460-001 an Offer of Settlement (Settlement) reached by PGT and the transportation customers to be served by the Expansion Project. The Settlement included a Stipulation and Agreement between PGT and its Expansion shippers, although no other parties participated in the settlement negotiations.

Application for Presidential Permit and Section 3 Authorization

On October 3, 1989, PGT filed in Docket No. CP90-1-000 an application for NGA section 3 authorization and a Presidential Permit to construct, operate, maintain, and connect proposed additions or modifications to its facilities operated at the international boundary between Canada and the United States for the service proposed in Docket No. CP89-460-000 *et al.*

---

[3] PG&E is the parent corporation of PGT.

January 22, 1991 Preliminary Determination

In an order issued on January 22, 1991,[4] we preliminarily approved PGT's proposed new facilities. Upon completion, the Expansion Project will allow PGT to receive on a firm annual basis: (1) approximately 872 MMcf per day of natural gas at Kingsgate, British Columbia, and (2) approximately 62 MMcf per day of gas at Stanfield, Oregon. PGT would then be authorized to deliver approximately 150 MMcf per day of gas to customers in the Pacific Northwest and approximately 766 MMcf per day of gas to an existing interconnection with PG&E at Malin, Oregon. The 62 MMcf per day of gas received at Stanfield would require upstream transportation by Northwest Pipeline Corporation (Northwest). Rates were based on the full maximum daily quantity level proposed by PGT. The Commission stated that whether or not the capacity constructed by PGT for transportation of the gas to be supplied by Northwest at Stanfield will be considered used and useful, and thus subject to inclusion in PGT's rate base, will be subject to the Commission's granting Northwest authorization to expand its existing system to accommodate the transportation of the 62 MMcf per day of gas.[5]

The January 22, 1991 order rejected the Settlement but preliminarily approved PGT's application for NGA section 3 authorization and a Presidential Permit. In addition, in view of our determination that PGT had unduly discriminated against

---

[4] 54 FERC ¶ 61,035 (1991).

[5] On December 31, 1990, Northwest filed application for a certificate of public convenience and necessity in Docket No. CP91-780-000, which included the construction of facilities to provide the transportation of the 62 MMcf per day of gas to PGT at Stanfield, Oregon. On June 5, 1992, in Docket No. CP91-780-000, *et al.*, the Commission issued Northwest a final certificate for an expansion of its existing transmission system that specifically included the 62 MMcf/d capacity to be available for transportation on behalf of PGT's Expansion shippers. 59 FERC ¶ 61,289. Whether the capacity constructed by PGT will be considered used and useful will be established in the context of a future rate proceeding.

non-utility shippers in its allocation of initial capacity, PGT was directed to establish new open season procedures for the initial allocation of the firm Expansion capacity, and to include such procedures in its tariff. Final certificate authority was reserved pending completion of the environmental review of PGT's proposal.

Further Certificate Amendment Application

On May 10, 1991, PGT filed a further amendment to its application. PGT stated that, in compliance with the directive of the January 22, 1991 order, it conducted a new open season from February 21, 1991, to March 22, 1991. PGT asserted that as a result of the open season, the Expansion is fully subscribed by utilities, marketers, and producers. PGT stated that one purpose of its amendment is to reflect the names of all the new open season shippers, their contract quantities, and related receipt and delivery points. The total PGT Expansion involves 927,410 MMBtu per day of gas.

PGT noted that it previously requested authorization to make deliveries in the Pacific Northwest at Spokane, Washington; Wallula, Washington; Stanfield, Oregon; and Hermiston, Oregon, with the possibility of adding additional delivery points based on the needs of specific customers. PGT stated that it allowed the bidders in the new open season to tender bids to any existing delivery point on the PGT system.

August 1, 1991 Order Issuing Certificate

On August 1, 1991, the Commission issued an order conditionally authorizing the Expansion Project. Among other things, the August 1, 1991 order granted PGT a certificate of public convenience and necessity authorizing PGT to construct and operate the Expansion facilities and to provide firm transportation service for various Expansion shippers. PGT's construction activities, however, were subject to various conditions. Ordering Paragraph (M) precluded PGT from initiating construction "until the Commission is assured that the Expansion Project shippers would receive nondiscriminatory treatment as to

access to the California markets by means other than on PG&E's Expansion Project facilities."[6] The Commission felt this condition necessary out of concern that the PGT shippers will not be able to use PG&E's facilities freely. In this regard, the Commission stated that interstate jurisdiction is frustrated by the discriminatory arrangements between PGT and PG&E. Thus, under the circumstances, the Commission could not find the public convenience and necessity served until the anticompetitive nature of the tying arrangement is eradicated. We directed PGT to submit a report evidencing the eradication of discriminatory conditions.

October 24, 1991 Order on Report

After consideration of PGT's report and the comments submitted therewith, the Commission determined that, on balance, the public convenience and necessity would not be served by further delay in PGT's commencement of construction of its Expansion Project as this could prevent the timely delivery of additional gas supplies to the Pacific Northwest and California. Therefore, on October 24, 1991, the Commission issued an order that modified the prohibition on construction imposed by Ordering Paragraph (M) of the August 1, 1991 order, and authorized construction and operation of the Expansion Project. As an incentive for PGT to work toward the elimination of unduly discriminatory conditions limiting the Expansion shippers' access to the California markets, the Commission reduced PGT's approved rate of return on equity from the previously approved 12.50 percent to 10.13 percent until such time that PGT demonstrates its and PG&E's rates or transportation policies do not result in unduly discriminatory restraints on shippers' access to transportation on the Expansion Projects. Upon removal of the construction condition, PGT promptly accepted its certificate and commenced construction in December 1991.

---

[6] 56 FERC ¶ 61,192, at p. 61,728.

Requests For Rehearing

Timely requests for rehearing of the August 1, 1991 order have been filed by Altamont Gas Transmission Company (Altamont), El Paso Natural Gas Company (El Paso), Indicated Expansion Shippers (IES), Kern River Gas Transmission Company (Kern River), PGT, Pacific Interstate Transmission Company (PITCO) jointly with Southern California Gas Company (SoCalGas), the Producer Associations, the Public Service Commission of the State of California (CPUC), San Diego Gas and Electric (San Diego), Southern California Edison Company (Edison), and Union Pacific Resources Company (Union Pacific).

Timely requests for rehearing of the October 24, 1991 order have been filed by Altamont, Amoco Production Company jointly with Amoco Canada Petroleum Company, Ltd. (Amoco), California Gas Producers Association (California Producers), El Paso, IES, Kern River, PGT, and the Producer Associations.

We note that, on occasion, petitioners present issues and arguments duplicative of those previously raised before and resolved by the Commission in our earlier orders in this proceeding. To the extent those parties requesting rehearing raise essentially the same issues and merely repeat essentially the same arguments, reiterating their dissatisfaction with our previous decisions, their requests for rehearing are denied, and we direct those parties to the prior orders for resolution of those issues.

Several parties have petitioned for review of the orders in this proceeding in the United States Court of Appeals for the District of Columbia Circuit.[7] Once a Commission order is appealed and the Commission forwards the record in the case to court, the Commission no longer has jurisdiction to act in the

---

[7] *Altamont Gas Transmission Company v. FERC*, No. 91-1369, and consolidated cases Nos. 91-1393, 91-1477, and 91-1480.

case.[8] We will, therefore, address the requests for rehearing and clarification subject to obtaining leave of the court. Those issues which final agency action has rendered ripe for judicial review—*e.g.*, the assertion of Amoco, El Paso, Kern River, and the Producers Association that the Commission should have disregarded the Hinshaw status of PG&E and assumed regulatory jurisdiction over the PG&E's proposed expansion in California—will not be further considered in the context of this rehearing.

Request to Take Official Notice of Separate Proceeding

On February 9, 1993, El Paso filed a motion requesting the Commission take official notice of a proposal by SoCalGas and San Diego to construct pipeline facilities that would permit transportation of gas from the Kern River Station to the Mexican border (Project Vecinos).[9] El Paso states that the facilities proposed by SoCalGas and San Diego will interconnect with the PG&E Expansion facilities at the Kern River Station. Allegedly, Project Vecinos will thereby cause a portion of the PGT/PG&E expansion volumes to be transported to and consumed in Mexico (either directly or by displacement). El Paso argues that under these circumstances, PG&E would no longer qualify for exemption from the Commission's jurisdiction under the NGA section 1(c) Hinshaw provision, since PG&E would no longer meet the statutory requirement that all the natural gas it receives be ultimately consumed within the State of California.

SoCalGas and San Diego filed an answer arguing that Project Vecinos will not affect the jurisdictional status of PG&E's facilities and, therefore, is irrelevant to the instant proceeding. PGT filed an answer asserting that El Paso's motion (1) is procedurally defective as an untimely request for rehearing and (2) improperly seeks official notice of speculative

---

[8] 15 U.S.C. § 717r(b) (1988).

[9] *See* Docket Nos. CP93-117-000 and CP93-119-000, filed on December 16, 1992.

assertions concerning the outcome of an ongoing proceeding, rather than "facts."[10]

Speculation concerning the outcome in Docket Nos. CP93-117-000 and CP93-119-000 is premature; the Commission has yet to reach any determination in those separate proceedings that would affect PG&E's Hinshaw status. Further, we find that El Paso's assertions based on the proposed project in Docket Nos. CP93-117-000 and CP93-119-000 do not raise any issues material to our decision in the instant proceeding. Therefore, we will deny El Paso's request for official notice. The immaterial filings in Docket Nos. CP93-117-000 and CP93-119-000 will not become part of the record in this proceeding.[11]

Several parties request an evidentiary hearing or that we initiate discovery procedures. We note such measures are required only when the written submissions do not afford an adequate basis for resolving disputes about material facts.[12] We affirm our finding, as discussed at length in the August 1, 1991 order, that all material issues of fact in dispute are capable of being resolved on the basis of the existing record. Therefore, requests for an evidentiary hearing and for discovery are denied.

We affirm our prior finding that PITCO's and SoCalGas' concerns regarding PGT's initial rates and cost allocation, and whether PGT will be able to later impose additional costs on existing customers, are appropriately addressed in a future section 4 or section 5 rate proceeding. Accordingly, we deny the parties' request to institute a crediting mechanism in relation to the Expansion Project's initial rates.

---

[10] *See* 18 C.F.R. § 385.508(d) (1992).

[11] *See* 18 C.F.R. § 385.509(a) (1992).

[12] *Louisiana Ass'n of Independent Producers and Royalty Owners v. FERC*, 958 F.2d 1101,1113-15 (D.C. Cir. 1992); *Air Lines Pilots Ass'n v. Dept. of Transportation*, 791 F.2d 172, 179 (D.C. Cir. 1986).

Request for Confidential Information

In requests for rehearing of the August 1, 1991 order, Altamont and Union Pacific contend that PGT has not provided adequate market data to support its application. The parties request access to certain market and supply information filed by PGT under the provisions of section 388.112 of the Commission's regulations.[13] El Paso, in motions filed July 24, 1990, and June 24, 1991, sought access to the same information.

The Commission has received and reviewed PGT's market and supply information on two separate occasions. Our initial review of PGT's market data found adequate evidence of market need. However, our consideration of PGT's market data following PGT's second open season found that PGT relied, in part, on interruptible sales by marketers as evidence of market need. In response, we stated that if PGT's anticipated volumes do not materialize, "PGT is not guaranteed cost recovery and would not necessarily be allowed to allocate the cost of the facilities to other customers unless it could show that the facilities were in fact being used for the benefit of these customers."[14]

Public disclosure of this information could cause competitive harm to PGT and the Expansion shippers by revealing terms of agreements under negotiation between the shippers and their markets or suppliers. We affirm our previous denial of the rehearing requests and motions that similarly sought disclosure of the market and supply data submitted by PGT under the provisions of section 388.112. We conclude, as we did in the August 1, 1991 order, in response to an identical rehearing request, that "we see no need to divulge PGT's customer data to competitors in order to resolve the issues presented here."

---

[13] 18 C.F.R. § 388.112 (1992).

[14] 56 FERC ¶ 61,192, at p. 61,681.

At-Risk Conditions

At the time of the August 1, 1991, and October 24, 1991 orders, the Commission contemplated the issuance of a construction rule in Docket No. RM90-1-000 to consider, inter alia, aspects of risk allocation, capacity allocation, and rates. Therefore, the Commission elected to toll or defer certain issues in anticipation of the final construction rule.[15] We find issues previously tolled or deferred in our earlier orders may be resolved without reliance upon that rule. In response to a request by Edison, we clarify that the at-risk conditions and the approved rate of return will apply immediately to the Expansion Project's initial rates.

Traditional Section 7(c) Certificate v. Optional Certificate

Altamont and Kern River assert the Commission acted arbitrarily in authorizing the Expansion Project, since PGT could not satisfy each of the *Kansas Pipe Line*[16] criteria applicable in a traditional NGA section 7(c) application. Petitioners contend that their optionally certificated projects and PGT's traditionally certificated project are competitors seeking to serve the same California market and complain that by applying differing standards of certification to the similarly situated projects, the Commission has discriminated in favor of PGT. Altamont and Kern River request that the Commission impose upon PGT's Expansion Project the same rate and risk requirements which were imposed upon their optionally certificated projects.[17] Kern River alternatively requests it be offered the

---

[15] The construction rule has since issued but has yet to take effect. The Commission stayed the effective date until 30 days after publication in the Federal Register of an order on rehearing. 57 FERC ¶ 61,195 (1991). Order No. 555, *Revisions to Regulations Governing Authorizations for Construction of Natural Gas Pipeline Facilities, FERC Statutes and Regulations* ¶ 30,928 (1991).

[16] *Kansas Pipe Line & Gas Company, et al.*, 2 FPC 29 (1939).

[17] *Kern River Gas Transmission Company*, 56 FERC ¶ 61,194 (1991), clarified, 57 FERC ¶ 61,069 (1991); *Altamont Gas Transmission Company,*

(footnote continues)

opportunity to operate under rates and terms similar to those granted to PGT. Altamont alternatively requests that the Commission dismiss PGT's application for failure to satisfy the requirements for a traditional NGA section 7(c) certificate.

Commission Response

The optional certificate procedure was adopted to provide pipelines with the ability to offer new service and construct new facilities on a timely basis by easing the barrier to entry posed by the traditional NGA section 7(c) certification process.[18] In return for assuming the full economic risk of a project, the applicant for an optional certificate enjoys a rebuttable presumption that its proposal satisfies NGA section 7(e) and is required by public convenience and necessity. Optional certificate applications need not await the outcome of the Commission's measured evaluation of the *Kansas Pipe Line* standards

---

(footnote continued)

54 FERC ¶ 61,028 (1991) (Preliminary Determination), 56 FERC ¶ 61,199 (1991) (Order Issuing Certificates), *reh'g pending.*

[18] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, 50 Fed. Reg. 42408 (Oct. 18, 1985), *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,665, at pp. 31,569-570 (1985), *vacated and remanded, Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), *readopted on an interim basis*, Order No. 500, 52 Fed. Reg. 30334 (Aug. 14, 1987), *FERC Statutes and Regulations, Regulations Preambles 1986-1990* ¶ 30,761 (1987), *remanded, American Gas Association v. FERC*, 888 F.2d 136 (D.C. Cir. 1989), *readopted*, Order No. 500-H, 54 Fed. Reg. 52344 (Dec. 21, 1989), *FERC Statutes and Regulations, Regulations Preambles 1986-1990* ¶ 30,867 (1989), *reh'g granted in part and denied in part*, Order No. 500-I, 55 Fed. Reg. 6605 (Feb. 26, 1990), *FERC Statutes and Regulations, Regulations Preambles 1986-1990* ¶ 30,880 (1990), *aff'd in part and remanded in part, American Gas Association v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), cert. denied, 111 S.Ct. 957 (1991), *stayed in part on remand*, Order No. 500-J, 56 Fed. Reg. 6962 (February 21, 1991) [*FERC Statutes and Regulations* ¶ 30,915]. *See* Part 157, subpart E, 18 C.F.R. §§157.100-157.106 (1991).

and of competing projects; instead, an optional certificate applicant benefits from an expedited procedure that "enables pipelines to make an occasional endrun around the costs and delays of ordinary certification."[19] An optional certificate application, for example, will not be held up for resolution of the issue of duplicative facilities since the authorization does not provide for an exclusive certificate.

Ordinary certificate applicants are expected to submit the documentation specified in section 157.14 of the Commission's regulations (the codification of the *Kansas Pipe Line* criteria) in order to demonstrate a proposed project will be required by the public convenience and necessity. However, since the 1939 *Kansas Pipe Line* decision, the gas industry has evolved. Consumers increasingly have multiple, competitive sources from which to purchase gas, rather than a monopolistic single source. In addition, as acknowledged and addressed in Order No. 636, the market to be served has increasingly been determined by nonpipeline shippers transporting gas for end-users rather than by pipelines offering bundled services.[20] Considering these changed circumstances, rigid adherence to the historical supply and market analysis may no longer serve the public interest because the imposition of such requirements could impede the

---

[19] *American Gas Distributors v. FERC*, 824 F.2d 981, 1033 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

[20] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 57 Fed. Reg. 13267 (April 16, 1992), *FERC Statutes and Regulations* ¶ 30,939, at pp. 30,396-397 (April 8, 1992); *order on reh'g*, Order No. 636-A, 57 Fed. Reg. 36128 (August 12, 1992), *FERC Statutes and Regulations* ¶ 30,950 (August 3, 1992); *order on reh'g*, Order No. 636-B, 57 Fed. Reg. 57911 (December 8, 1992), 61 FERC ¶ 61,272 (November 27, 1992). The Final Rule requires significant alterations in the structure of interstate natural gas pipeline services and provides a schedule for implementing that restructuring. The rule applies to all pipelines that provide open-access transportation service. Nothing in this order should be construed as in any way diminishing the obligations of PGT to comply fully with the requirements of Order Nos. 636, 636-A, and 636-B.

availability of new sources of competitively priced and environmentally preferable energy.

In response, we have, on a case-by-case basis, granted traditional section 7(c) certificate authorization where the gas supply or market showing is not as strong as once required. To assure the public interest is protected in such cases, we have, pursuant to our section 7(e) authority, granted certificates subject to conditions placing the pipeline at risk for a shortfall in cost recovery due to a supply or market failure.[21] Because under such a condition the certificate applicant voluntarily shoulders the full financial risk, there is no additional need to protect ratepayers by requiring the same extensive showing that a proposed project is necessary and feasible.

In this case, the Commission determined PGT's gas supply and market data were insufficient to meet the Kansas Pipe Line standards (see discussion below). To assure that the public interest would not be adversely affected, the Commission insulated the ratepayer by placing PGT at risk for the recovery of those costs associated with an inadequate supply or market. Although the results of PGT's first open season adequately demonstrated market need, we found the results of PGT's second open season relied in part on what appeared to be new shippers' spot sales to justify market need. We stated that even though contracts are signed, there is always the possibility that interruptible and spot sales may not materialize. As a result, we found the results of the second open season insufficient to support a finding of market need.[22] Therefore, PGT will remain at risk for the recovery of the costs of these facilities. The

---

[21] *See, e.g., Transwestern Pipeline Company,* 54 FERC ¶ 61,031, at p. 61,093 (1991), *order on reh'g,* 56 FERC ¶ 61,196 (1991) (authorizing the construction of facilities in the absence of executed firm contracts with shippers, but placing the pipeline at risk for costs associated with the new facilities in the event the new capacity is not subscribed under firm contracts at the time the pipeline files to include the costs in their rates).

[22] 56 FERC ¶ 61,192, at p. 61,681.

allocation of the costs and risk of these facilities will be considered when PGT files a rate case under NGA section 4. In view of the above, we will deny Altamont's request that we dismiss PGT's application for failure to satisfy the requirements for a traditional NGA section 7(c) certificate.

The claim that the Commission's issuance of an optional certificate along with an economically mutually exclusive traditional certificate violates fundamental fairness and the spirit of *Ashbacker Radio Corporation v. FCC* (*Ashbacker*)[23] was rejected, because "[o]bviously applicants under the [optional expedited certificate] and traditional § 7 procedures are not similarly situated."[24] We find the similar effort to equate the terms and conditions of optional certificates with a traditional certificate to be inappropriate. Pipelines elect to apply for the type of authorization best suited to a particular project. Under certain circumstances (*e.g.*, where the evidence showing satisfaction of the *Kansas Pipe Line* criteria is marginal), a pipeline may even choose to submit simultaneously applications for optional and traditional certificates for the same project.[25]

Since our consideration of optional and traditional applications proceeds on different tracks, subject to separate criteria and conditions, the authorization of PGT's Expansion Project in no way precluded Altamont and Kern River from receiving a full opportunity for the consideration of their optional certificate applications on the merits. The proper forum for Altamont or Kern River to pursue modification of their optional certificates or to seek to vacate their optional certificates in favor of a traditional certificate would be in a pending rehearing of the

---

[23] 326 U.S. 327, 90 L.Ed. 108 (1945) (holding that before an agency grants a license, it must grant a full comparative hearing to each applicant that has filed for a mutually exclusive permit or license); *Midwestern Gas Transmission Company v. FPC*, 258 F.2d 660, 666 (D.C. Cir. 1958) (applying Ashbacker to applications under the NGA).

[24] *Public Utilities Commission of the State of California v. FERC*, 900 F.2d 269, 278 (D.C. Cir. 1990).

[25] We would not issue redundant dual certificate authority. *See Mojave Pipeline Company, et al.*, 55 FERC ¶ 61,179, at p. 61,572 (1991).

order in which the optional certificate was issued, or in a new proceeding. In view of the regulatory distinctions separating optional from traditional certificates, we deny the requests to collapse the differences between these types of certificates by proscribing identical rate and risk requirements for each of the projects.

Adequacy of Gas Supply

In the January 22, 1991 Preliminary Determination, we found that while there appeared to be sufficient supplies of Canadian gas, due to the incomplete supply arrangements of PGT's shippers, PGT would be placed at risk for any shortfall in cost recovery due to inadequate National Energy Board (NEB) export or Department of Energy, Office of Fossil Energy (DOE/FE) import authorization.[26] Repeating arguments previously presented, Altamont and Kern River contend that PGT has not, under traditional certificate requirements, shown adequate gas supplies to support its proposed Expansion Project.

Commission Response

As part of PGT's section 7(c) application, we examined evidence of the extent of the Canadian producers' gas reserves available to PGT's Expansion shippers and concluded, based on the best available estimates at that time, that the reserves were adequate to provide natural gas for the Expansion Project's anticipated 30-year economic life.[27] Considering the record evidence indicating the existence of adequate and reliable Canadian gas supplies, and considering that the petitioners have not presented evidence to contradict the earlier showing of sufficient supplies, we will not alter our initial determination.

For the reasons previously discussed, we are not persuaded that the Altamont and Kern River proposals to impose identical risk conditions on the potentially competitive pipeline projects are justified.

---

[26] 54 FERC ¶ 61,035, at pp. 61,157-158.

[27] *Id.*; 56 FERC ¶ 61,192, at pp. 61,701-702.

Adequacy of Markets

The January 22, 1991 Preliminary Determination found that PGT had adequately demonstrated market need for the Expansion Project under the traditional *Kansas Pipe Line* criteria.[28] However, the results of PGT's second open season did not support the same showing of market need since some of new shippers, who had partially displaced the original utility and LDC shippers intending to serve their own firm markets, are marketers serving the interruptible spot market.[29] We found that reliance on spot market sales is inappropriate to justify a market for case-specific section 7(c) transportation authority. In response, we determined that in the event the anticipated sales volumes do not materialize:

> PGT is not guaranteed cost recovery and would not necessarily be allowed to allocate the cost of the facilities to other customers unless it could show that the facilities were in fact being used for the benefit of these customers.[30]

In addition, we conditioned the certificate of public convenience and necessity to assure that existing pipeline customers are protected against subsidizing or insuring the Expansion Project by placing PGT at risk for market shortfalls and prescribing an initial incremental rate treatment for the Expansion facilities.

Altamont asserts that the deficiencies in PGT's market data are not cured by the at-risk condition imposed in the August 1, 1991 order. Altamont and Kern River request that on rehearing the Commission either impose risk conditions on PGT like those imposed on Altamont and Kern River or dismiss PGT's application for failure to satisfy traditional certificate requirements.

---

[28] 54 FERC ¶ 61,035, at p. 61,157.

[29] 56 FERC ¶ 61,192, at p. 61,681.

[30] 56 FERC ¶ 61,192, at p. 61,681.

Union Pacific contends the condition putting PGT at risk for cost recovery and allocation is insufficient assurance that ratepayers will be protected from the costs of market failure. Union Pacific asserts that the evidence presented in this proceeding shows the Expansion Project is not required to serve the future needs of the California market. Union Pacific aggregates the volumes potentially available upon the completion of the proposed projects of Kern River and Mojave Pipeline Company,[31] Transwestern Pipeline Company,[32] and Altamont,[33] then compares this sum of nearly 3 bcf per day to the lesser sum of 900 MMcf per day by 1995 and 1.6 to 2.1 bcf per day by 2005, which it states the CPUC predicts will be California's needed new capacity. Union Pacific states that PGT's transportation agreements may not be honored and therefore do not substantiate market need.

Commission Response

PGT has demonstrated, and we have confirmed, that extensive additional capacity will be required in the markets the Expansion Project will serve.[34] The Commission determined that approximately one-third of the expansion volumes will be used to satisfy new market demand in California, with the rest displacing current supplies on existing pipelines. This displacement should serve to encourage supply diversity, enable interruptible shippers to firm-up service, and increase natural gas competition throughout California. The condition putting PGT at risk for cost recovery and allocation should ensure that present and future customers do not make an inappropriate contribution to the costs associated with the Expansion Project.

---

[31] 50 FERC ¶ 61,069 (1990) (Order Issuing Certificates).

[32] 54 FERC ¶ 61,031 (1991) (Preliminary Determination); 56 FERC ¶ 61,196 (Order Issuing Certificate) (1991).

[33] 54 FERC ¶ 61,028 (1991) (Preliminary Determination); 56 FERC ¶ 61,199 (1991) (Order Issuing Certificates).

[34] 54 FERC ¶ 61,035, at p. 61,157; 56 FERC ¶ 61,192, at pp. 61,702-703.

By considering the several projects' proposed capacities, Union Pacific is, in effect, conducting an ad hoc Ashbacker-type comparison that overlooks the regulatory demarcation between optionally and traditionally certificated projects. Further, we disagree with the methodology of evaluating market need merely by totaling up the potential volumes of other projects.[35] Union Pacific asserts that the various pipeline projects are destined to serve an identical market. However, the PGT Expansion will serve markets in the Pacific Northwest, an area other projects are not expected to reach. Moreover, other projects are designed to principally serve the enhanced oil recovery (EOR) operations in central and southern California, whereas PGT has stated it does not propose to serve the EOR market.

We have previously determined that PGT's proposed Expansion Project is not similarly situated to other proposed projects and, therefore, does not trigger an *Ashbacker* comparative hearing. We have confined our evaluation of market need to the projected market demand and to PGT's transportation agreements. Following PGT's second open season we have, as noted above, placed PGT at risk in the event its anticipated sales volumes do not materialize. We affirm this condition is adequate to protect the public interest. As previously noted, we are not persuaded that the Altamont and Kern River proposals to impose identical risk conditions on the potentially competitive pipeline projects are justified.

Import and Export Authority

Notwithstanding our confidence in the existence of adequate Canadian natural gas supplies, the August 1, 1991 order expressed our concern that the majority of PGT's expansion

---

[35] We note that Altamont has announced its intention to delay the scheduled in-service date for its pipeline by one year, until November 1994.

shippers lacked long-term export and import authority and imposed the following at-risk condition:

> PGT shall be required to bear the responsibility for any shortfall in cost recovery if the Canada NEB fails to grant export authority of sufficient duration and volumes to allow for the recovery of the costs of the facilities approved herein. In that event, the applicants are explicitly prohibited from shifting any of the costs associated with the facilities authorized herein onto any of their other customers. This same provision shall apply to the import authority ultimately granted by DOE/FE to the shippers if that import authority proves to be of shorter duration or a lower volume than necessary for the recovery of costs associated with the facilities and services authorized herein.[36]

PGT requests that we remove this condition, arguing that the Expansion shippers, not PGT, are responsible for obtaining the necessary authorizations. PGT also requests we confirm that PGT will not be at risk for the recovery for the reservation charges under its contracts with its Expansion shippers.

Altamont asserts this at-risk condition imposes no risk at all if gas supplies are not obtained or simply fail, and that even if NEB export or DOE/FE import authorization is deficient, PGT would continue to recover its fixed costs under contracts with its Expansion shippers.

Commission Response

While the shippers bear the responsibility of obtaining export and import authorizations, PGT remains responsible for presenting evidence that its proposed project will be supplied with sufficient volumes of transportable natural gas. As noted above, the record evidence indicates that there are adequate and available Canadian gas supplies. Recently, in *Great Lakes Gas Transmission Limited Partnership v. FERC* (*Great Lakes*),

---

[36] 56 FERC ¶ 61,192, at p. 61,702.

the United States Court of Appeals for the District of Columbia Circuit stated that once an applicant has made a satisfactory showing concerning Canadian gas supplies then, absent a reasoned explanation, imposing an NEB at-risk condition on transporters of Canadian gas is inappropriate since it is "over and above the accessibility showing [the Commission] typically requires of transporters of domestic gas."[37] The court describes this condition as effectively requiring a pipeline transporting Canadian gas to remain at risk for the full cost recovery period of the pipeline, and notes the depreciable life can extend beyond the ten year contracts the Commission accepts as evidence of a pipeline's long-term utility. In accordance with Great Lakes, we will remove the NEB export authorization at- risk condition. In addition, we will also remove the at-risk condition for DOE/FE import authorization. We can reasonably be assured that DOE/FE will continue to grant the necessary import authorizations, since the Energy Policy Act of 1992, amends NGA section 3 to require that all applications for authorization to import natural gas from "a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas ... shall be deemed consistent with the public interest, and ... shall be granted without modification or delay."[38] Further, we note that DOE/FE has recently accelerated consideration of requests for import authorization in response to the Energy Policy Act.[39]

The Commission finds that each shipper voluntarily accepted the financial risk of its failure to obtain adequate

---

[37] Case No. 91-1394, slip op. at p. 13 (D.C. Cir., decided January 22, 1993). Typically, the Commission requires facilities transporting domestic gas to show the proposed capacity is subscribed under contract for ten years. *See Northwest Pipeline Corporation*, 58 FERC ¶ 61,079, at pp. 61-271-272 (1992) (citing cases), *on reh'g*, 59 FERC ¶ 61,289 (1992).

[38] Pub. L. No. 102-486, § 201, 106 Stat. 2776 (1992). *See National Fuel Gas Company*, 62 FERC ¶ 61,041 (1993).

[39] *See, e.g.*, DOE/FE Order No. 90-04-NG (Rochester Gas and Electric Company) and Order No. 89-33-NG (Niagara Mohawk Power Corporation).

export or import authorization. Absent a showing of bad faith, it would be inappropriate to set aside agreements reflecting the parties' informed allocation of risk.[40] Therefore, we clarify that to the extent PGT's applicable tariffs and transportation service agreements shift the financial responsibility for obtaining export or import authorization to the Expansion shippers, PGT may recover the specified reservation charges during the term of each of the shippers' contracts.[41] We differ with Altamont's interpretation of this at-risk condition since, in the event the supply of gas is prematurely depleted, PGT will continue to bear the financial burden of sustaining service until such time as abandonment is authorized pursuant to NGA section 7(b).

Downstream Capacity

The August 1, 1991 order stated that "PGT and its shippers should be solely at risk for adequate downstream capacity."[42] Edison and San Diego Gas & Electric assert that this is unreasonable in that it requires an individual shipper to assume the risk that other shippers will fail to arrange for adequate downstream capacity. Edison and San Diego Gas & Electric request the Commission eliminate the words "and its shippers."

IES states that, in the event PG&E fails to construct its companion expansion facilities, PGT's Expansion shippers will experience cutbacks and a bottleneck at the Malin, Oregon delivery point. IES requests that under such circumstances, PGT be placed at risk for the possible underutilization of its Expansion Project, or alternatively, be required to certify under oath that sufficient take-away capacity exists to support its Expansion.

---

[40] *See Tennessee Gas Pipeline Company v. FERC*, 824 F.2d 78, 82 (D.C. Cir. 1987).

[41] *See, e.g., Northwest Pipeline Corporation*, 59 FERC ¶ 61,289, at pp. 62,058-059 (1992); *Iroquois Gas Transmission System, L.P., et al.*, 57 FERC ¶ 61,089, at pp. 61,322-323 (1991); *Iroquois Gas Transmission System, L.P., et al.*, 57 FERC ¶ 61,350, at pp. 62,146-147 (1991), *order on reh'g*, 59 FERC ¶ 61,094 (1992).

[42] 56 FERC ¶ 61,192, at p. 61,727.

Commission Response

While we do not require a pipeline to show that all its contract shippers have adequate gas supplies committed under contract, we do require a pipeline to show that gas supplies are generally available and accessible to it and its shippers.[43] In order to demonstrate that gas will flow through a proposed facility, we have required both firm, long-term contracts and a showing that upstream or downstream barriers to the flow of gas do not exist. Where long- term NEB authority is uncertain, we have imposed an at-risk condition (see above). Where the existence of downstream capacity is uncertain, we have required the upstream pipeline to assume the risk of underutilization in order to ensure that present and future customers do not make inappropriate contribution to the costs associated with the unused capacity.[44]

We clarify that each shipper is responsible only for its own failure to secure adequate downstream capacity for its contracted capacity on the PGT expansion. An individual shipper will not be at risk for the failure of another shipper to arrange for adequate downstream capacity where the actions of the other shipper are beyond the control of the individual shipper.

Rates

Edison requests clarification that the actual costs of the Expansion Project will be subject to scrutiny in PGT's next section 4 rate case and further requests the Commission not preclude future refunds or adjustments if the estimated costs prove higher than the actual costs. We clarify that actual costs will be included in our considerations in a future rate case. We note that we have accepted updated estimates of the PGT's

---

[43] *See, e.g., Northwest Pipeline Corporation*, 58 FERC ¶ 61,079, at pp. 61,271-272 (1992), *order on reh'g*, 59 FERC ¶ 61,289 (1992).

[44] *See, e.g., Northwest Pipeline Corporation*, 56 FERC ¶ 61,300, at pp. 62,267-268 (1991), *supplementing*, 56 FERC ¶ 61,006 (1991), *amended*, 58 FERC ¶]nb61,079 (1992), *order on reh'g*, 59 FERC ¶ 61,289 (1992).

projected project costs and clarify that any subsequent modifications to PGT's initial rates will apply prospectively.

Rate of Return on Equity

PGT previously proposed a rate design based on a 14.00 percent rate of return on equity and a 100 percent reservation charge. The January 22, 1991 Preliminary Determination approved a rate of return of 12.75 percent and an enhanced fixed variable (EFV) rate design. The August 1, 1991 order replaced the EFV rate design with the 100 percent reservation charge originally negotiated between PGT and the Expansion shippers for Rate Schedule T-3 transportation. Correspondingly, PGT's rate of return on equity was reduced from 12.75 percent to 12.50 percent in accordance with the Commission's determination that a 25-basis-point reduction in the rate of return appropriately reflects the reduction in risk in shifting from the modified fixed variable (MFV) to a straight fixed variable (SFV) rate design.[45]

PGT asserts that the Commission: (1) failed to reconsider the 14.00 percent rate of return it had proposed in its 1989 amended application, (2) improperly derived the 12.75 percent rate of return recommended in the January 22, 1991 Preliminary Determination by comparing PGT's proposed pipeline project with existing pipelines not exposed to the same risks, (3) "rather summarily" reduced the 12.75 percent rate of return on equity to 12.50 percent upon altering the rate design methodology from EFV to a 100 percent reservation charge in its August 1, 1991 order, and (4) established a 10.13 percent rate of return in its October 24, 1991 order that is both too low and improperly derived. PGT characterized the Commission's action in approving a 10.13 percent rate of return as an improper "attempt to dictate or exercise veto control over intrastate rates and transportation policies."[46]

---

[45] *See, e.g., Texas Eastern Transmission Corporation, et al.*, 55 FERC ¶ 61,477 (1991), *order on reconsideration*, 58 FERC ¶ 61,254 (1992).

[46] PGT Petition of November 25, 1991, at p. 5.

In the October 24, 1991 order, PGT's rate of return was reduced from 12.50 to 10.13 percent, the lower end of the zone of reasonableness previously determined by the Commission for return on common equity. This rate was intended to provide an incentive for PGT to work toward the elimination of unduly discriminatory conditions and was to remain in effect until PGT demonstrated that neither its rates or transportation policies, or those of PG&E, would result in unduly discriminatory restraint on shippers' access to transportation service.

Altamont, Amoco, the California Producers, El Paso, IES, and Kern River assert that reducing the rate of return on equity from 12.50 to 10.13 percent is inconsequential since 10.13 percent remains within the zone of reasonableness. The parties argue the lowered rate will not act as an adequate incentive to motivate PGT to try to alter the existing discriminatory conditions; therefore, there is no justification for lifting the construction ban imposed in Ordering Paragraph (M) of the August 1, 1991 order. PGT repeats its prior complaints that (1) the zone of reasonableness is improperly derived, (2) a 10.13 rate of return on equity is insufficient compensation for the risks assumed and (3) the approved rate of return may not allow PGT to maintain its credit and attract capital. (Rehearing requests concerning the Commission's authority to attach conditions to the issuance of a certificate are discussed below in Ordering Paragraph (M).)

Commission Response

14.00 to 12.50 percent

A 12.75 percent rate of return was established after comparing the Expansion Project proposal with eight similar certificated pipelines. The January 22, 1991 order determined that:

> Based on a [discounted cashflow] study, the median expected investor return for the pipelines in the proxy group is 13.02 and the average 13.12 percent, on an approximately 40-percent equity ratio and an MFV rate design. The 12.75 percent rate of return recommended for

> PGT reflects that the lower risk of the EFV rate design is somewhat offset by a higher risk posed by its lower 30-percent equity ratio.[47]

A discounted cashflow analysis of the proxy group resulted in a rate of return zone of reasonableness between 10.13 and 15.80 percent.

We recognize that no pipeline proxy group can exactly match the characteristics of PGT's proposed project; however, the Commission attempted to minimize differences in selecting a group composed of predominately transmission companies with a profile resembling PGT. Further, as we noted at the time, the derived rate "is in line with returns allowed by the Commission for existing pipelines and with estimated investor expected returns for industrial companies."[48] Therefore, we affirm the 12.75 percent rate recommended in January 22, 1991 Preliminary Determination.

Since the August 1, 1991 order, in which we ordered the 25-basis-point reduction to reflect the changed rate design, Order No. 636 has been issued. In that order, we required pipelines to recover their transportation costs under the SFV rate design methodology, unless permitted otherwise.[49] In instituting this generic change, we did not require pipelines to make a corresponding 25-basis-point reduction in their rate of return. In view of this change in our regulatory policy, we find it would be inequitable to hold PGT to a 25-basis-point reduction in its rate of return as a result of previously adopting our subsequently mandated rate design.[50] Therefore, we will grant rehearing of PGT's request and establish 12.75 percent as the Expansion Project's approved rate of return on equity. However, we affirm the October 24, 1991 order's finding that this

---

[47] 54 FERC ¶ 61,005, at pp. 61,151-152.

[48] *Id.* at pp. 61,151-152. (Footnotes omitted.)

[49] *FERC Statutes and Regulations* ¶ 30,939, at pp. 30,431-435.

[50] *See Tennessee Gas Pipeline Company, et al.*, 59 FERC ¶ 61,199 (1992) (authorizing a 100 percent demand charge by Algonquin Gas Transmission Company without requiring a reduction in its rate of return).

12.75 rate is not just and reasonable in light of the unduly discriminatory restraint on shippers' access to transportation service on the PGT/PG&E system.

Edison requests that we state whether the 25-basis-point reduction in the rate of return on equity and PGT's initial rates will be affected by Order Nos. 555 and 636. We clarify that PGT's initial rates may be modified prospectively in the context of a future rate proceeding or in PGT's restructuring proceeding.

12.50 to 10.13 percent

As previously discussed, we find a 10.13 percent rate of return offers a reasonable assurance that the Expansion Project will be financially feasible. Further, the approved rate design provides PGT greater confidence that it will recover costs. Consequently, we deny PGT's request for an increased rate of return on equity.

We correspondingly find that a 10.13 rate of return strikes an appropriate balance between approving a financially feasible project and the unduly discriminatory rate treatment imposed upon PGT. There is no question that this rate of return deprives PGT of substantial earnings as long as the lowered rate remains in effect. For this reason, we affirm our previous finding that this lower rate of return will serve as a strong incentive for all interested parties—especially PGT and the CPUC—to work toward the elimination of what this Commission finds to be unduly discriminatory conditions affecting interstate commerce.

As a result, we reject petitioners' assertion that, due to steadily falling interest rates, the lower end of the zone of reasonableness, based on the yield of Baa public utility bonds in 1990,[51] is now unduly generous. We recognize the financial markets have changed since the 1991 Preliminary Determination; however, it is impossible to repetitively revisit our earlier calculations in an ongoing effort to account for continually

[51] 54 FERC ¶ 61,035, at p. 61,151.

changing conditions. By way of compensation, all parties are equally exposed to the risk of fluctuations in market. An NGA section 4 or 5 proceeding is the proper forum in which to seek redress in response to changed market circumstances. Moreover, we find that this rate of return strikes a reasonable balance: it allows a project the Commission has found to be in the public convenience and necessity to proceed while seeking to redress the unduly discriminatory rate issues discussed earlier. Therefore, we will not reconsider the previously established zone of reasonableness in this section 7 proceeding.

100 Percent Reservation Charge

PGT's amended application, filed October 3, 1989, proposed a Rate Schedule T-3 consisting of six mileage-based, one-part monthly reservation charges designed to recover the total incremental fixed costs allocated to firm transportation. The January 22, 1991 Preliminary Determination approved an incremental rate but rejected the 100 percent reservation charge. Instead, in order to achieve consistency between PGT's initial rates for its incremental facilities and the EFV rate design currently effective for PGT's existing facilities, we directed PGT to use the same EFV rate design for its Expansion Project.[52] We reconsidered this decision in the August 1, 1991 order, and replaced the EFV rates with the milage-based, 100 percent reservation charge rates originally negotiated between PGT and its Expansion shippers. The rates were adjusted to reflect our approval of a 12.50 rate of return on equity and an updated estimate of the cost of the Expansion Project.[53]

The August 1, 1991 order referred to the approved Rate Schedule T-3 as being based on a "100 percent reservation charge" and also as being based on a "straight fixed variable" rate design. Several parties claimed these references to the rate design are inconsistent or ambiguous. The Producer Associations state that they assume the Commission intended a 100

---

[52] 54 FERC ¶ 61,035, at p. 61,149.

[53] 56 FERC ¶ 61,192, at pp. 61,705-61,707.

percent reservation charge; Union Pacific states that it assumes the Commission intended a SFV rate. Altamont requests the Commission clarify that the August 1, 1991 order approved an SFV rate design and, as a result, requests the Commission establish an appropriate throughput level for the purpose of calculating the SFV component usage charge. PGT interprets approval of a 100 percent demand charge as requiring the rejection of all requests to set a throughput level.

Edison asserts that it is inequitable for the Commission to find PGT's existing Expansion shippers agreed to rates designed using a 100 percent reservation charge. Edison states that Edison and the cities of Burbank, Glendale, and Pasadena, California (the Cities) objected to PGT's inclusion of alternative tariff sheets, reflecting a 14.00 percent rate of return and a 100 percent demand charge, in PGT's prior application and in its request for rehearing of the January 22, 1991 Preliminary Determination.

Commission Response

Rate Schedule T-3 specifies that shippers pay a single, fixed monthly reservation charge per Mcf for firm transportation on PGT's Expansion Project.[54] This is described in the tariff as a 100 percent reservation charge; there is no usage charge. In other words, on a monthly basis, a shipper will be billed the same whether it transports all of its reserved capacity or none.[55] We clarify that references in our prior orders to Rate Schedule T-3 as based on an SFV rate or as a 100 percent demand charge, are intended to designate the above-described 100 percent reservation charge.

---

[54] PGT will provide interruptible transportation on an open-access basis using its currently effective system-wide interruptible transportation rate. The Expansion Project will provide transportation services only, not sales.

[55] The only charges in addition to the 100 percent reservation charge are for compressor fuel and line losses. Rate Schedule T-3, section 5.6.

The August 1, 1991 order noted that the change from the EFV rate design approved by the January 22, 1991 order rendered PGT's objection to the 95 percent throughput level moot.[56] However, the August 1, 1991 order also deferred a request by Kern River that the Commission clarify whether the 95 percent throughput condition established along with the EFV rate would be a permanent certificate condition.[57] Since the approved 100 percent reservation charge does not require a throughput condition for the purpose of calculating a usage charge (because there is no additional usage charge), requests that we further consider a throughput level are dismissed as moot.

The Cities' objection to PGT's filing of tariff sheets reflecting a 100 percent reservation charge was addressed in the August 1, 1991 order. We noted that our acceptance of the 100 percent reservation charge on rehearing rendered the Cities' argument moot.[58] The Cities did not request rehearing of the August 1, 1991 order. Edison does not object to the adoption of the 100 percent reservation charge rate design. The Cities and Edison have executed 30-year transportation service agreements based on a 100 percent reservation charge rate design. In view of the above, we do not consider it inequitable to have found that the Expansion shippers voluntarily agreed to a 100 percent demand charge and to approve PGT's proposed rate design based, in part, on that finding.

Cost Allocation

Kern River states, without further elaboration, that the Commission has allowed PGT to derive rates without any allocation to the Expansion of the costs of existing facilities that will be used by the new shippers and that PGT has underallocated operation and maintenance costs to the Expansion Project.

---

[56] FERC ¶ 61,192, at p. 61,707.

[57] 56 FERC ¶ 61,192, at p. 61,703.

[58] 56 FERC ¶ 61,192, at p. 61,723.

PITCO and SoCalGas raise similar issues. It would be premature to reply to these allegations at this time. As noted in the Preliminary Determination, in reply to the same complaints by PITCO, "These issues relate to how the project may affect rates that are not before the Commission in this proceeding. They are more appropriately raised in PGT's next rate case."[59] We repeat that questions concerning the propriety of cost allocations for existing facilities and the extent to which each of PGT's various customers benefit from the existing and Expansion facilities will be addressed in detail in PGT's next NGA section 4 or section 5 rate proceeding.

Rate Tilt

The January 22, 1991 order directed PGT to use an EFV rate design, rather than PGT's proposed 100 percent reservation charge. Rehearing of that decision was sought on the grounds that the EFV rate would allegedly create a "rate tilt" favoring Canadian over domestic gas by virtue of an artificial (i.e., not market based) regulatory advantage. We fully addressed this issue in the August 1, 1991 order and rejected any remedial rate revision.

The Producer Associations and Union Pacific complain the change in rate design from EFV rates to a 100 percent reservation charge will amplify the alleged rate tilt. The rehearing requests restate or incorporate the arguments previously presented. Petitioners contend that the rate design approved in the August 1, 1991 order is inequitable as it will place pipelines transporting domestic gas, sold on the basis of an MFV rate, at a disadvantage in competing for the California market against PGT, transporting Canadian gas sold on an SFV basis. The parties propose the Commission, within its wide latitude to evaluate all factors bearing on the public interest, take notice of the competitive disadvantage induced by PGT's rate methodology and compensate by adjusting the transportation rates on PGT's Expansion Project.

---

[59] 54 FERC ¶ 61,035, at p. 61,145.

Opinion Nos. 256 and 256-A[60] sought to assure that United States pipeline rates would treat Canadian gas costs no differently than domestic gas costs. The parties argue that, to this end, the Commission may, under its "extremely broad" NGA section 7 conditioning authority,[61] reclassify and reallocate pipeline costs between demand and commodity charges in setting rates for imported gas once it enters the United States to compensate for the disparity between the Canadian SFV and domestic MFV rate designs,[62] without intruding on the terms of the contracts between the Canadian suppliers and the local distribution companies (LDCs), and without interfering with the import authorization of DOE/FE. The Producer Associations state that there is no basis for assuming PGT's Expansion Project transportation rates were freely negotiated.

Commission Response

In Opinion No. 256 [37 FERC ¶ 61,215], the Commission adjusted a domestic interstate pipeline's rates in order to offset a Canadian purchase price that passed through Canadian rates to United States customers by incorporation into a domestic sales contract in order to ensure that the costs included in demand charges were comparable in import and export arrangements. The Expansion Project involves the certification of pipeline facilities which will be utilized solely for the transportation of gas within the United States and, in that context, the transportation of gas owned by third parties. Unlike the pipeline in Opinion No. 256, PGT is not a party to the gas sales contracts. PGT is merely charging shippers a cost-of-service transportation fee; here there is no purchase price pass-through

---

[60] *Natural Gas Pipeline Company of America*, 37 FERC ¶ 61,215 (1986) (Opinion No. 256), *reh'g granted in part and denied in part*, 39 FERC ¶ 61,218 (1987) (Opinion No. 256-A), *aff'd sub nom., TransCanada Pipe-Lines Ltd., et al. v. FERC*, 878 F.2d 401 (D.C. Cir. 1989) (TransCanada).

[61] *Citing Transcontinental Gas Pipe Line Corporation v FERC*, 589 F.2d 186, 190 (5th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980). *See also Atlantic Refining Company v. Public Service Commission*, U.S. 378, 391 (1959).

[62] *TransCanada*, 878 F.2d 401, 410.

since PGT is not purchasing Canadian gas for resale. We find no evidence that the contracts at issue were not negotiated at arm's-length and entered into in good faith. We affirm that PGT and PG&E, although affiliates, are independent entities, therefore, we reject the Producer Associations' proposal to apply Opinion No. 256 to expansion volumes transported by PGT on behalf of PG&E.

The Commission has no direct jurisdiction over the purchase arrangements in Canada between United States LDCs and Canadian producers applicable to gas transported over the PGT expansion pipeline[63] and has hesitated to adjust rates in order to avoid jurisdictional conflict with the Canadian and state regulatory authorities and DOE/FE[64] and to adhere to obligations under the Canada—U.S. Free Trade Agreement (FTA).[65]

The Commission faced an analogous situation in *Iroquois Gas Transmission System, L.P., et al.*, (Opinion No. 357)[66] and found Order No. 256 inapplicable. We stated that our policy is "to encourage proposals which increase the supply options of gas buyers and enhance competition," not to "protect existing suppliers from competition." We do not attempt to adjust for all

---

[63] 56 FERC ¶ 61,192, at p. 61,708; *TransCanada*, 878 F.2d 401, 407.

[64] DOE/FE considers competitiveness, need, and security of supply in determining whether a proposed import is consistent with the public interest. See New Policy Guidelines and Delegation Orders from Secretary of Energy to Economic Regulatory Administration and FERC Relating to the Regulation of Imported Natural Gas, 49 Fed. Reg. 6684, 6687-88 (February 22, 1984). *See also TransCanada*, 878 F.2d 401, at p. 407.

[65] The FTA's "national treatment" obligation prohibits the Commission from treating Canadian gas supplies less favorably than domestic gas supplies. Part 1, Chapter 1, Article 105, Part 2, Chapter 5, Article 501, 27 I.L.M. 281, at pp. 294, 314 (1988) (incorporating the definition of "national treatment" in Part II, Article III of the General Agreement on Tariffs and Trade, 61 Stat. A5, A18-A19 (1947)).

[66] *Iroquois Gas Transmission System, L.P., et al.*, 53 FERC ¶ 61,194 (1990) (Opinion No. 357).

rate differentials between competing pipelines, since such differentials may exist for a variety of reasons and are administratively difficult to identify. The Commission's policy is simply to ensure that a new pipeline's rate design does not give it an "unfair advantage."[67] We have accepted varying rates between Canadian and domestic transportation as we have accepted varying rates for transportation of exclusively domestic gas where there are legitimate reasons for the rate differentials.[68] "The market doesn't always treat all market participants equally. The Commission's statutory responsibility is to insure that its regulatory policies do not frustrate the market from producing results most beneficial to consumers."[69] We declined to alter Iroquois' rates, concluding to do so would be inconsistent with obligation under the Canada—United States FTA, administratively impractical, and would result in a regulatory morass. Our decision was recently upheld on appeal.[70] The issue of international inconsistencies in rate design, and the need for Commission action to adjust for gas costs passed through on an as-billed basis, are not relevant to PGT's proposed project. Therefore, we affirm our prior decision not to alter the Expansion Project rates.

We note the implementation of Order No. 636 should serve to harmonize the ratemaking methodologies between United States and Canadian pipelines and among domestic interstate pipelines and, in part, restructuring will supersede the rationale upon which petitioners base their request. Order No. 636 specifies that unless the Commission permits otherwise, pipelines are to recover their transportation costs under the SFV method.[71] To now attempt, while in midst of a transition

---

[67] 53 FERC ¶ 61,194, at pp. 61,701-702.

[68] *Tennessee Gas Pipeline Company, 51 FERC ¶ 61,113, at p. 61,284 (1990) (NIPPS II).*

[69] 53 FERC ¶ 61,194, at p. 61,702, *quoting*, 51 FERC ¶ 61,113, at p. 61,284.

[70] *Louisiana Ass'n of Independent Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1123 (D.C. Cir. 1992).

[71] *FERC Statutes and Regulations* ¶ 30,939, at pp. 30,434-435.

from MFV to SFV, to readjust PGT's transportation rates in order to account for the alleged discriminatory differential with the MFV-designed rate on competing domestic pipelines, would be to take futile aim at a moving target and potentially frustrate realization of the Commission restructuring goals. Additionally, we note the proposed North American Free Trade Agreement, Article 606(2), requires each country to ensure that its energy regulatory bodies "avoid disruption of contractual relationships to the maximum extent practicable." In view of the above, we conclude it would be inappropriate to extend our regulatory authority to the Expansion shippers' purchase arrangements.

Tariff Provisions of Rate Schedule T-3

Section 8, Curtailments and Interruptions

The August 1, 1992 order directed PGT to revise its proposed section 8 of Rate Schedule T-3 in order to avoid the possibility of a new service jeopardizing the capacity rights of existing shippers without their participation and concurrence. Initially, section 8 stated that in the event of curtailments "PGT shall use the remaining available firm capacity on its entire combined system, to the extent reasonable within the operational limitations of that system." This language was replaced to allow the Expansion shippers, in the event of curtailment, to use excess capacity on the existing system "so long as the use of such excess capacity . . . does not disrupt service to the existing shippers."[72]

PGT requests we reinstate the language of its initially proposed section 8 of its tariff, arguing that existing customers will benefit from the Expansion facilities and it would be impractical to differentiate between existing and expansion volumes in a curtailment situation. Edison and San Diego explain that the revised language does not distinguish between firm and interruptible shippers and request the Commission clarify the references to expansion and existing shippers.

---

[72] 56 FERC ¶ 61,192, at pp. 61,717-718.

Commission Response

Firm transportation service enjoys a priority over interruptible transportation service. This distinction would be disturbed if existing interruptible shippers were to enjoy a priority over firm expansion shippers. Therefore, we will require PGT to revise the relevant portion of section 8 of Rate Schedule T-3 to read as follows:

> If excess capacity is available at that time on the existing system, that excess capacity may also be used to provide transportation service to the firm expansion shippers, as long as the use of such excess capacity for that purpose does not disrupt service to the firm existing shippers.

Section 5.3, Reservation Charge Credit—PG&E CT-1 Service

Formerly, section 5.3 of Rate Schedule T-3 provided that if a shipper receives firm transportation service from PG&E under PG&E's Rate Schedule CT-1, then that shipper shall be entitled to a reservation charge credit from PGT in certain situations. In the August 1, 1992 order, we noted that this credit was available only to shippers on PGT's Expansion that employed PG&E for further downstream transportation. In order to preclude a potential tying arrangement and avoid undue rate preferences, we directed PGT to either delete this section or provide the same reservation charge credit to any downstream transportation.

Edison, San Diego, and PGT urge retention of the PG&E credit. They state that the motive in providing the credit was not to favor PG&E, but was included as an incentive for PGT and PG&E to efficiently coordinate the operations of the two pipelines. PGT states that requiring it to make similar arrangements with unaffiliated pipelines would require it to eliminate this benefit. Edison and San Diego argue similar operational efficiencies are not attainable between PGT and other unaffiliated downstream pipelines and, therefore, mandating a similar credit would serve no purpose and "seems unfair."

Commission Response

Even granting petitioners' assertion that the intention behind the credit is benign, the outcome nonetheless results in unwarranted preferential treatment for those Expansion shippers that agree to employ both PGT and PG&E for its transportation. We affirm the reasoning and the result of our August 1, 1992 order.

Section 9, Gas Quality

Section 9 of Rate Schedule T-3 provides that once a shipper delivers gas to meet the requirements of the upstream pipeline, PGT unconditionally agrees to redeliver an equivalent quality of gas to PG&E at Malin, Oregon. The August 1, 1991 order required that PGT "must make the same gas quality specification commitment to any upstream or downstream pipeline at any other delivery point."[73] PGT states that requiring it to make similar assurances to unaffiliated pipelines would require it to eliminate this benefit. Edison and San Diego object that making section 9 "universal" fails to recognize the special circumstances facing certain shippers to southern California that must comply with gas quality standards in excess of PGT's standards.

Commission Response

As we stated in the August 1, 1991 order, we have no objection to PGT's unconditionally assuming the burden of meeting its shippers' gas quality specifications (a burden previously assumed by the shippers). However, as we previously explained in response to the proposed provisions of section 5.3, we do object to tariff provisions that result in disparate treatment of Expansion shippers depending on whether they ship gas downstream on PG&E or on another pipeline. Without the proviso that PGT apply section 9 "universally,' the only Expansion shippers to benefit will be those that also ship gas on PG&E. Therefore, we affirm that to retain section 9, PGT must

---

[73] 56 FERC ¶ 61,192, at p. 61,719.

make the same gas quality specification commitment to any upstream or downstream pipeline at any other delivery point.

Section 6.2, Capacity Assignment

The August 1, 1991 order directed PGT to remove the capacity assignment provision of sections 6.1 and 6.2 from Rate Schedule T-3. We also noted that the reference in section 6.2 to paragraph 19.2 of the General Terms and Conditions was inappropriate as paragraph 19.2 did not address matters related to capacity allocation. We affirmed our finding in the March 15, 1991 order that issues relating to capacity brokering should await resolution of PGT's capacity brokering program in Docket No. CP90-1031-000.[74]

San Diego requests that section 6.2 be reinstated in order "to preserve the standard contract right to assign contractual rights which is distinct from capacity brokering."[75]

Commission Response

San Diego states that the General Terms and Conditions section 19.2, Assignability, "relates not to capacity brokering but to the traditional contract principle of assigning contract rights and the process therefore."[76] We concur. We find that the section 6.2 of Rate Schedule T-3 need not be reinstated as requested in order to preserve the right of assignment, since

---

[74] 52 FERC ¶ 62,075 (1990) (Order Issuing Blanket Certificate). The 1990 order did not address capacity brokering, since PGT filed an application for a transportation assignment program in Docket No. CP90-1031-001. PGT's pending application was dismissed following Order No. 636 on the grounds that PGT's proposal did not sufficiently comply with the generically applicable requirements under Order No. 636. *Northern Natural Gas Company, et al.*, 59 FERC ¶ 61,362 (1992), *reh'g denied*, 60 FERC ¶ 61,235 (1992). Issues of capacity brokering are appropriately addressed in PGT's restructuring proceeding.

[75] San Diego's Motion for Rehearing and Clarification at p. 25 (September 3, 1991).

[76] *Id.*

that right is retained in section 19.2 of the General Terms and Conditions. Therefore, San Diego's request is denied.

Ordering Paragraph (M)

In the August 1, 1991 order, we issued PGT a certificate for the construction and operation of the Expansion Project, but in Ordering Paragraph (M) prohibited PGT from commencing construction "until the Commission is assured that the PGT shippers are receiving nondiscriminatory treatment as to access to the California markets by means other than on the PG&E expansion."[77] We stated that "[w]ithout this condition, we could make no public convenience and necessity finding."[78]

Rehearing requests by the CPUC, PGT, Edison, and San Diego oppose the construction condition in Ordering Paragraph (M). PGT claims the Commission's "withholding" of PGT's license to commence construction constitutes a sanction within the meaning of the Administrative Procedure Act and is improperly imposed.

The October 24, 1991 order acknowledged that the Expansion shippers remained subject to discriminatory treatment, but upon reconsideration we found that, on balance, the need to assure timely deliveries of gas supplies to the growing California market outweighed our concerns regarding potential undue discrimination. Accordingly, the construction ban was lifted. At the same time, we lowered PGT's rate of return on equity from 12.50 to 10.13 percent until such time as PGT demonstrates its and PG&E's rates or transportation policies do not result in unduly discriminatory restraints on shippers' access to transportation in order to provide PGT with an incentive to work towards the eradication of all discriminatory practices.

PGT asserts that the Commission is imprecise and vague in specifying what actions would suffice to eradicate the undue

---

[77] 56 FERC ¶ 61,192, at p. 61,728.

[78] *Id.* at p. 61,726.

discrimination and thereby result in a restoration of the higher rate of return.

Altamont, Amoco, the California Gas Producers, El Paso, IES, Kern River, and the Producers Association argue the October 24, 1991 modification of Ordering Paragraph (M) is improper in principle and inadequate in practice. Rather than authorize then penalize the Expansion Project, the parties propose that the Commission either immediately reinstate the construction ban or preclude operation until unduly discriminatory practices are eliminated.

The parties assert that the Commission's rationale for reversing its August 1, 1992 position and lifting the construction ban was insufficient as a matter of law, since the discriminatory conditions found to be unacceptable in the previous order remain unchanged. The parties contend that once the Commission identified discriminatory practices, then until such practices are corrected, NGA sections 4, 5, and 7 preclude a finding that the Expansion Project is or will be required by the present or future public convenience and necessity. The Commission's concern with "ensuring the timely consideration and construction of new gas facilities to meet growing gas demand"[79] does not constitute a reasoned explanation supported by substantial evidence justifying approval of a discriminatory and anticompetitive project. The reduced rate of return on equity does not eradicate the undue discrimination, therefore, the Expansion Project cannot be in the public convenience and necessity and the Commission's modification of Ordering Paragraph (M) is arbitrary and capricious. Further, the reduced rate of return is characterized as inconsequential in comparison to the advantages of enhanced market power the certificated facilities and service will provide PGT. Finally, the parties note the Commission's obligation under NGA section 5 to correct unduly discriminatory practices and argue that the authorization of the Expansion Project is inconsistent with this obligation.

---

[79] 57 FERC ¶ 61,097, at p. 61,360.

Commission Response

Since the October 24, 1991 order modified the construction condition imposed in Ordering Paragraph (M), those portions of the rehearing requests that oppose the construction prohibition are dismissed as moot. PGT's contention that the condition constitutes a sanction is similarly dismissed as moot.

In previous orders, we identified those aspects of PGT's Expansion Project that result in unduly discriminatory access to the California market.[80] PGT complains we have neglected to itemize the remedies that would constitute a cure of the identified discrimination.

We recognize that the unduly discriminatory rate conditions are the product of rate and transportation policies subject to the jurisdiction of the CPUC. Those practices subject to our jurisdiction we have addressed, e.g., the Preliminary Determination required a second open season to allow prospective shippers to bid for PGT's Expansion capacity without being obliged to simultaneously bid for PG&E's Expansion capacity. Accordingly, we decline to dictate the form a remedy might take.[81]

The CPUC has recently redressed, in part, the discrimination previously identified by eliminating the mandatory "double backbone charge," whereby Expansion shippers were required to pay two transmission demand charges to effect delivery to northern California on PG&E's existing facilities.[82] However, the CPUC does not provide a sufficient remedy (see discussion below of "Ordering Paragraph (M)"). Therefore, we decline PGT's request to reconsider removing the 10.13 percent ceiling on PGT's rate of return on equity.

---

[80] *See* 57 FERC ¶ 61,097, at pp. 61,360-361.

[81] *See* 57 FERC ¶ 61,097, at pp. 61,360-361.

[82] CPUC Decision 92-10-056 (October 21, 1992) (rehearing of the original Decision 90-12-119, 39 Cal.P.U.C.2d 69, and subsequent modifying decisions), *reh'g denied and decision modified*, CPUC Decision 93-02-018 (February 3, 1993).

The CPUC's decision to charge shippers the same single postage stamp rate whether making deliveries to northern or southern California end-users alleviates, in part, our concern that Expansion shippers seeking to deliver volumes in northern California would be obliged to pay both for delivery to southern California on the PG&E expansion and then pay again for transport back north on PG&E's existing facilities. The CPUC continues to ban volumes transported on PGT's interstate Expansion from 'crossing over' at the California border to PG&E's existing intrastate facilities.[83] A customer with reserved firm capacity on PG&E's existing facilities remains barred from contracting for direct delivery of gas transported on the PGT Expansion. The CPUC "stress[es] that the crossover ban in no way connotes a limitation on a shipper's physical access to particular facilities; the PG&E Expansion facilities will be fully integrated with the existing PG&E system and gas will flow through a single expanded intrastate system."[84]

Physical access to PG&E's existing facilities, however, is not the only consideration. The intrastate rate applied to gas carried on PGT's Expansion will continue to be tied to the PG&E Expansion's postage stamp rate, and the lower rates available on PG&E's existing facilities will remain inaccessible. Delivery of PGT's Expansion volumes would have to be scheduled via a semi-round trip, first south on PG&E's Expansion to its terminus at the Kern River Station, then back north on PG&E's existing facilities. This continues to constitute unduly discriminatory access to the California markets by means other than on the PG&E Expansion.

In the October 24, 1991 order, we stated that:

> [T]his case brings into conflict two important FERC policy objectives—assuring non-discriminatory access to pipeline facilities, on the one hand, and ensuring the timely

---

[83] CPUC Decision 93-02-018, slip op. at pp. 2-13, 20.

[84] CPUC Decision 92-10-056, slip op. at pp. 15, 26.

consideration and construction of new gas facilities to meet growing gas demand on the other.[85]

Our modification of the construction condition of Ordering Paragraph (M) was a reasoned, balanced response to these conflicting objectives. The fact that the underlying circumstances did not change between issuance of the August and October orders does not in itself preclude our reconsideration of our prior decision.[86] Record evidence established the need for additional gas supplies to satisfy the growing California market, as we found in our previous orders in this proceeding.[87] Our reconsideration of this need, and our recognition that the extensive construction planned and the need for PGT to comply with environmental mitigation measures would require at least two years before the Expansion Project could become operational, resulted in our determination that we could accommodate and balance conflicting objectives by permitting construction to go forward along with providing an appropriate incentive to continue to work to eliminate undue discrimination.

We consider PGT's reduced rate of return on equity a certificate condition reasonably tailored to accomplish our goal of inducing a change to a policy beyond our jurisdictional purview.[88] We have previously weighed the possibility of undue discrimination against a competing policy objective, e.g., the need to assure ongoing transportation of gas, and found in favor of resolving the conflict in a future section 5 proceeding

---

[85] 57 FERC ¶ 61,097, at p. 61,360.

[86] *See American Public Gas Ass'n v. FPC*, 567 F.2d 1016, 1031 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978) ("An agency may of course reconsider its approach even in the absence of any new evidence.")

[87] *See* 54 FERC ¶ 61,035, at pp. 61,157-158.

[88] *See Ozark Gas Transmission System v. FERC*, 897 F.2d 548, 553 (D.C. Cir. 1990) (FERC may attach certificate conditions "reasonably tailored so as to accomplish the Commission's stated objective of promoting fair competition").

rather than an ongoing section 7 proceeding.[89] We affirm our determination that the modification to Operating Paragraph (M) and the reduction in PGT's rate of return are a legitimate exercise of our broad conditioning authority.[90]

Request for Stay

On December 12, 1991, Altamont filed a motion for stay of the orders issued on August 1, 1991, and October 24, 1991, pending judicial review by the United States Court of Appeals for the District of Columbia. At a minimum, Altamont requested the Commission stay the prior orders pending action on Altamont's requests for rehearing of the orders.

In arguing that the orders be stayed, Altamont claims: (1) it is likely to prevail on its requests for rehearing of the prior orders, (2) allowing PGT to begin construction could put Altamont at a substantial and irreparable competitive disadvantage, (3) a stay will not unduly burden PGT, and (4) a stay is in the public interest in order to preserve the status quo and to provide an opportunity for effective relief, thereby avoiding irreparable injury to both Altamont and potential shippers.

In reaching the decisions set forth in the August 1, 1991, and October 24, 1991 orders, the Commission considered and balanced the interests of the applicants, Altamont, and the public. Altamont's request presents no new information that warrants issuance of a stay and we will, therefore, deny the request.

Request for Writ of Mandamus

On February 23, 1993, Altamont filed a request with the United States Court of Appeals for the District of Columbia Circuit, requesting the Court establish a briefing schedule in

---

[89] 89 *Great Lakes Gas Transmission Company*, 41 FERC ¶ 61,094, at p. 61,249 (1987). *See also ANR Pipeline Company, et al. v. FERC*, 876 F.2d 124, 133 (D.C. Cir. 1989).

[90] *See* 57 FERC ¶ 61,097, at p. 61,360, n.5.

case No. 91-1369, *et al.*, or alternatively, issue a Writ of Mandamus, compelling the Commission to rule on the pending requests for rehearing.

One-Year Construction Condition

PGT requests modification of Ordering Paragraph (N) of the August 1, 1991 order, which states that within one year from the date PGT obtains approval from the Commission that condition (M) has been satisfied, it must complete construction and place in service the Expansion facilities. PGT states that the Expansion Project requires a two-year construction schedule to minimize disruption of service to existing customers and to adhere to the mandated environmental protection measures and requests we modify the previous order to accommodate these circumstances. In view of the above, we will grant PGT's request.

The Commission orders:

(A) The requests for rehearing and clarification of the August 1, 1991 order and October 24, 1991 order are granted in part and denied in part as discussed in the body of this order.

(B) The requests for an evidentiary hearing or for discovery procedures are denied.

(C) Ordering Paragraph (N) of the August 1, 1991 order is modified to read as follows:

> (N) PGT shall complete construction and place in service the facilities authorized herein within 2 years from the date PGT obtains approval from the Commission that condition (M) of this order has been satisfied.

(D) PGT shall file revised tariff sheets, reflecting the revised language in section 8 of Rate Schedule T-3, as discussed in the body of this order, within 30 days after the issuance of this order.

(E) El Paso's request that the Commission take official notice of the SoCalGas and San Diego proposal in Docket Nos. CP93-117-000 and CP93-119-000 is denied.

(F) This order is issued subject to leave of the United States Court of Appeals for the District of Columbia Circuit.

On December 31, 1990, Northwest filed an application for a certificate of public convenience and necessity in Docket No. CP91-780-000, which included the construction of facilities to provide the transportation of the 62 MMcf per day of gas to PGT at Stanfield, Oregon. On June 5, 1992, in Docket No. CP91-780- 000, et al., the Commission issued Northwest a final certificate for an expansion of its existing transmission system that specifically included the 62 MMcf/d capacity to be available for transportation on behalf of PGT's Expansion shippers. 59 FERC ¶ 61,289. Whether the capacity constructed by PGT will be considered used and useful will be established in the context of a future rate proceeding.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler, Jerry J. Langdon and Branko Terzic.

Pacific Gas Transmission Company	Docket Nos. CP89-460-000, CP89-460-001, CP89-460-003, CP89-460-006, CP89-460-007, and CP90-1-000

Order on Report and Modifying Prior Order

(Issued October 24, 1991)

On August 1, 1991, the Commission issued an order granting a certificate of public convenience and necessity to Pacific Gas Transmission Company (PGT)[1] with the condition that PGT may not initiate construction until the Commission is assured that the PGT Expansion Project shippers are receiving nondiscriminatory treatment as to access to the California markets by means other than on the Pacific Gas and Electric Company (PG&E) expansion. The Commission directed that within 20 days after issuance of the order, PGT file information with the Commission evidencing that all discriminatory practices relating to PGT shipper access to California markets have been eliminated. Interested parties were afforded 10 days thereafter to respond.

This order constitutes the Commission's response to PGT's report and the pleadings submitted in connection therewith.

---

[1] 56 FERC ¶ 61,192 (1991).

I. Background

Original Application

Almost three years ago, on December 8, 1988, PGT filed an application in Docket No. CP89-460-000, pursuant to section 7(c) of the Natural Gas Act (NGA), for a certificate to construct and operate a substantial expansion of its existing pipeline system and to provide firm interstate transportation for certain large utility customers located in the Pacific Northwest and California. PGT requested authority to transport up to 710 MMcf per day of gas, on a firm basis, from Kingsgate, British Columbia. Under the proposal, approximately 150 MMcf per day of gas would be delivered on a firm basis to the Pacific Northwest and 600 MMcf per day of gas on a firm basis would be delivered to an existing interconnection with PG&E at Malin, Oregon.[2] The deliveries to California would be effected through an expansion of the PG&E system.

October 1989 Amendment

Subsequently, on October 3, 1989, PGT filed in Docket No. CP89-460-001 an amendment to its application to reflect the fact that capacity on the expansion project was fully subscribed through the execution of exclusive precedent agreements. PGT's amendment altered the design of the proposed facilities in order to increase the volumes delivered and to provide seasonal service. The revised facility proposal included 430 miles of 42-inch diameter looping on PGT's existing system, instead of the 36-inch diameter looping as proposed in its initial application. Under the amendment, PGT also planned to add additional delivery points in order to provide interruptible transportation service and to revise its proposed receipt and delivery points.

---

[2] PG&E is the parent corporation of PGT.

The Settlement

On November 8, 1989, PGT filed in Docket No. CP89-460-001 an Offer of Settlement (Settlement) reached by PGT and the transportation customers to be served by the expansion project. The Settlement included a Stipulation and Agreement between PGT and its expansion shippers, although no other parties participated in the settlement negotiations.

Application for Presidential Permit and Section 3 Authorization

On October 3, 1989, PGT filed an application for section 3 authorization and a Presidential Permit to construct, operate, maintain and connect proposed additions or modifications to its facilities operated at the international boundary between Canada and the United States for the service proposed in Docket No. CP89-460-000 *et al.*

January 22, 1991 Order

In an order issued on January 22, 1991 [54 FERC P 61,035], the Commission preliminarily approved PGT's proposal to expand its existing facilities. The authorization would allow PGT, on a firm annual basis, to receive: (1) approximately 872 MMcf per day of natural gas at Kingsgate, British Columbia, and (2) approximately 62 MMcf per day of gas at Stanfield, Oregon. PGT would then be authorized to deliver approximately 150 MMcf per day of gas to customers in the Pacific Northwest and approximately 766 MMcf per day of gas to an existing interconnection with its parent, PG&E, at Malin, Oregon. The 62 MMcf per day of gas received at Stanfield would require upstream transportation by Northwest Pipeline Corporation (Northwest).[3]

---

[3] On December 31, 1990, Northwest filed an application for a certificate of public convenience and necessity in Docket No. CP91-780-000 which includes the construction of facilities to provide the transportation of the 62 MMcf per day of gas to PGT at Stanfield. A preliminary determination was issued in the proceeding on July 1, 1991.

The January 22, 1991 order also rejected the settlement but preliminarily approved PGT's application for NGA section 3 authorization and a Presidential Permit. In addition, in view of a determination in that order that PGT had unduly discriminated against nonutility shippers in its allocation of initial capacity, PGT was directed to establish new open season procedures for the initial allocation of the firm expansion capacity, and to include such procedures in its tariff. Final certificate authority was reserved pending completion of the environmental review of PGT's proposal.

Further Certificate Amendment Application

On May 10, 1991, PGT filed a further amendment to its application. PGT stated that, in compliance with the directive of the January 22, 1991 order, it conducted its new open season from February 21 to March 22, 1991. PGT asserted that as a result of the open season, the expansion is fully subscribed by utilities, marketers and producers. PGT stated that one purpose of its amendment is to reflect the names of all the new open season shippers, their contract quantities, and related receipt and delivery points. The total PGT expansion involves 927,410 MMBtu/d of gas.

PGT noted that it previously requested authorization to make deliveries in the Pacific Northwest at Spokane, Washington; Wallula, Washington; Stanfield, Oregon; and Hermiston, Oregon, with the possibility of adding additional delivery points based on the needs of specific customers. PGT stated that it allowed the bidders in the new open season to tender bids to any existing delivery point on the PGT system.

August 1, 1991 order

On August 1, 1991, the Commission issued an order conditionally authorizing the PGT Expansion Project. Among other things, the August 1, 1991 order granted PGT a certificate of public convenience and necessity authorizing PGT to construct

and operate the expansion facilities and to provide firm transportation service for various expansion shippers. PGT's construction activities, however, were subject to various conditions, the one at issue here being condition (M). Condition (M) states: "PGT may not initiate construction until the Commission is assured that the PGT shippers are receiving nondiscriminatory treatment as to access to the California markets by means other than on the PG&E Expansion." The Commission felt this condition necessary out of concern that the PGT shippers will not be able to use PGT freely. In this regard, the Commission stated that interstate jurisdiction is frustrated by the discriminatory arrangement that PGT and PG&E possess. Thus, under the circumstances, the Commission could not find the public convenience and necessity served until the anticompetitive nature of the tying arrangement is eradicated. The Commission therefore attached condition (M) to PGT's certificate as a means of finding the project to be in the public convenience and necessity.

II. PGT's Report and the California Public Utilities Commission's Comments

Summary of Report by PGT

PGT describes the Commission's concerns in this proceeding as: (1) the economic consequences to shippers targeting Northern California markets if they are required to pay PG&E's incremental expansion costs, and also PG&E's present rate for deliveries utilizing its existing intrastate distribution system, and (2) the ability of PGT's shippers to use existing intrastate capacity rights on PG&E to move PGT Expansion volumes within California.

PGT believes that the first issue involves a rate issue which falls squarely within the jurisdiction of the Public Utilities Commission of the State of California (CPUC). In this regard, PGT notes that the CPUC has indicated its intention to accelerate its consideration of these rate issues and to announce its intent within 20 days.

PGT notes that no other proposed project has been subject to the construction condition placed upon it. PGT also informs the Commission that PG&E will advocate a partial rolled-in rate design before the CPUC, in its forthcoming expedited proceeding. PGT believes that adoption of this rate design will completely eliminate the current rate anomalies. PGT states, as it understands the proposal, that under this partial rolled-in rate design, expansion shippers and existing shippers would pay the same rates, thus avoiding the duplicative charges that Northern California shippers might otherwise be required to pay.

With respect to the second issue, PGT denies that the effect of the CPUC's recent orders is to prevent a PGT shipper from using existing capacity rights on PG&E's existing facilities to move PGT expansion volumes. Moreover, PGT states that the CPUC cross-over ban policy is only an interim measure until the CPUC can adequately address the intrastate rate anomalies that underlie the problem.

CPCU Comments

The CPUC submits that its interim rate determinations for PG&E's intrastate expansion facilities, including the postage stamp rate design and the cross- over ban, are a legitimate exercise of the state's ratemaking authority. Moreover, it is asserted that the Commission, in utilizing its conditioning authority to compel a change in intrastate rates, is exceeding its lawful authority. The CPUC asserts that the Commission's authority to determine the public convenience and necessity does not allow it to withhold such a determination merely because it does not agree with rate determinations within the exclusive jurisdiction of a state.

In an attempt to justify its present rate posture regarding PG&E, the CPUC notes that the incremental rates are only interim in nature. The CPUC explains that there is nothing remarkable about postage stamp rates, given that virtually all unbundled gas transportation rates in California are postage stamp rates. Moreover, the CPUC believes that the postage

stamp rate is supported by public policy promoting economic development of the state as a whole.

The CPUC, however, concedes that the present interim rate design for the PG&E Expansion Project would require Northern California shippers to pay the postage stamp rate and an additional existing facilities rate. However, the CPUC points out that it has agreed to examine the apparent inequity of such a requirement and eliminate it, if appropriate.

The CPUC explains that the cross-over prohibition is merely a feature of the CPUC's interim incremental rate design which is intended to ensure that existing customers are not forced to pay for incremental facilities which are not being constructed primarily for their benefit. The CPUC believes that there is clearly insufficient capacity on PG&E's existing system to receive and transport on a firm basis incremental volumes transported over the PGT expansion, without the construction of the PG&E expansion. Without the cross-over prohibition, the CPUC is afraid of some PGT migration over to the PG&E existing facilities. This, the CPUC argues, would render the policy behind the ban unenforceable.

Finally, the CPUC states that if the Commission continues to believe that the CPUC's rate policies constitute an unlawful tying, the Commission should still eliminate the disputed condition, and recast its tying arrangement language as a declaratory order.

On September 9, 1991, the CPUC filed a supplement to its original comments summarized above. The supplement contains the CPUC's "Order Granting Expedited Rehearing of Decision (D.) 91-06-017 and (D.) 91-06-053. The order notes that many of the issues on rehearing are the same issues of concern to the Commission. However, the order does nothing more than take official notice of the Commission's August 1, 1991 order and directs that an administrative Law Judge be assigned to the case and convene a prehearing conference within 30 days.

III. The Parties' Responsive Comments

Comments Supportive of Condition (M)

Generally, the parties supportive of the Commission's condition believe that PGT has plainly failed to satisfy the Commission's certificate condition. Altamont states that PGT shipper access to Northern California markets remains artificially restricted as a result of the CPUC decisions that: (1) have permitted PGT's parent, PG&E, to impose two separate transportation rates, including a postage stamp rate, for deliveries to Northern California, and (2) have prohibited cross-overs that would allow PGT expansion shippers to use PG&E's existing system to serve those markets. In this regard, Altamont notes that the CPUC has announced that it is unwilling to remove those restrictions at the present time. Furthermore, regarding the cross-over prohibition, Altamont argues that its discriminatory feature is that it would unlawfully prevent PGT expansion shippers from using any future capacity rights they may obtain, whether through capacity assignments or otherwise. Altamont rejects PGT's suggestion that it might be difficult to fulfill the Commission's requirements inasmuch as the CPUC could easily rescind its decisions regarding the cross-over prohibition and the postage stamp rate.

Altamont rejects PGT's assertions that the Commission's certificate obligation is fulfilled by an assertion by the CPUC that it may consider the propriety of the unlawful PGT/PG&E arrangements in future proceedings. Altamont argues that these discriminatory practices at issue cannot be left to the discretion of the CPUC.

Altamont asserts that the CPUC's contention that the certificate condition is unlawful is incorrect. Altamont emphasizes that the Commission is empowered to protect consumers against discriminatory practices.

Finally, Altamont rejects the CPUC's suggestion that the Commission transmute the certificate condition into a separate

declaratory order so that construction may proceed while the two agencies litigate the jurisdictional question. Referring to the August 1, 1991 order, Altamont states that "no public convenience and necessity finding could be made until after PG&E's unlawful practices have been eliminated."

The California Gas Producers Association (CGPA) contends that, contrary to the assertions of PGT, no progress has been made, nor is likely to be made, in such a way as to alleviate the Commission's legitimate concerns and responsibilities under the antitrust laws.

The CGPA believes that the type of "roll-in" proposal suggested by both the CPUC and PGT would eliminate the discrimination inherent with a postage stamp rate for delivery to Northern California. However, such an approach would create more serious anticompetitive concerns. The CGPA believes that under the roll-in contemplated, the costs of shipping gas to Kern River Station (the southernmost terminus of the expansion) would be cross-subsidized by ratepayers in Northern California, indigenous California Producers, and other out-of-state producers. The CGPA likens the subsidy inherent in such rolled-in pricing to a form of predatory pricing or monopolistic leveraging prohibited under the antitrust laws. The CGPA advocates the adoption of incremental mileage-based rates designed whereby the various shippers and end-users would face rates reflective of the costs actually needed to serve them.

Like Altamont, El Paso asserts that the Commission's mandate has not been satisfied. El Paso believes that PGT's response to the Commission's August 1, 1991 order condition fails to provide information regarding the elimination of the discriminatory practices relating to PGT shipper access to the California markets, but rather merely expresses an intent to accelerate the procedure for consideration of one of the issues which concerns the Commission, sometime after the Commission authorizes the commencement of construction.

El Paso asserts that PGT's commitment to accelerate consideration of rates for expansion service south of Malin is nonresponsive and wholly insufficient to satisfy the Commission's requirement. El Paso believes that the CPUC comments also either: (1) largely ignore the issue of whether expansion project shippers should be permitted to cross-over at Malin to existing facilities, or (2) inappropriately merge the issue with the separate issue of whether there should be a rolled-in costing of the project facilities south of Malin. El Paso points out that the implicit presumption is that the capacity south of Malin will be incremental capacity rather than capacity replacing existing capacity. El Paso explains, however, that the August 1, 1991 order was based on the assumption that the capacity south of Malin would displace existing capacity. Given the validity of this presumption, El Paso believes that the expansion project shippers should be able to utilize existing PG&E capacity at the same rate which displaced volumes would have borne, without the additional obligation to fund expansion project facilities south of Malin.

Also, El Paso notes that PG&E has refused to construct incremental capacity within California to match capacity which Transwestern is constructing outside of the state. As a result of such refusal, either Transwestern or El Paso capacity will be displaced because PG&E has refused to construct matching capacity downstream of the point of interconnection with the Transwestern and El Paso systems.

El Paso believes that the CPUC's rolling-in proposal (*i.e.*, a proposal to roll-in the expansion project costs to existing core Northern California ratepayers) does not resolve the tying problem. According to El Paso, under a rolling-in proposal, the expansion project facilities will still be constructed, regardless of whether or not necessary, and the expansion shippers will still be compelled to pay for costs associated with expansion project facilities south of Malin. Moreover, the proposal will shift at least $33 million of the annual costs of the expansion project to Northern California ratepayers only a few months

after the CPUC held that such ratepayers have no need for this capacity.

El Paso recommends that the CPUC simply rescind its prior finding that all shippers on the expansion project with capacity north of Malin are obligated to use the expansion project facilities South of Malin, so that they may use any means (including PG&E's existing system) available to transport their volumes south of Malin.

Echoing many of the comments made by El Paso and Altamont, the Indicated Expansion Shippers (IES) do depart significantly by asserting that PG&E's partial roll-in rate design proposal would completely resolve the matters of Commission concern.

IES, however, rebuts PGT's allegation that no other project has been singled out for such unequal treatment and also disagrees with the CPUC's interpretation of the scope of the Commission's conditioning powers.

Also, IES does not agree with the CPUC's proposition that the construction condition should be transmuted into a declaratory order. IES argues that this is not a mere academic dispute between the Commission and CPUC. It is fundamentally a question of the terms and conditions which must be adhered to for the Commission to make its public interest determination.

Comments Opposing Condition (M)

The Cities of Burbank, Glendale and Pasadena, California (Cities) note that PG&E is a Hinshaw pipeline which has its rates regulated by the State of California. The Cities state that if the Commission is using its conditioning power to require a change in this Hinshaw pipeline's intrastate rate, then the condition in Ordering Paragraph (M) is illegal.

Dekalb believes that the Commission may have acted unlawfully by conditioning the PGT certificate on PG&E rate issues and by violating the Commission's own policy of allowing

the market to decide which project it wants by placing a condition on one project that it has not placed on rival projects.

IGI is a marketer of gas. It believes that the Commission should rescind the disputed construction condition. Like some of the other parties opposing the condition, including Paramount Resources U.S. Inc., IGI argues that the Commission lacks jurisdiction to condition approval of the PGT expansion on CPUC modification of PG&E's intrastate rates. By conditioning PGT's construction commencement on elimination of the unlawful tying, a product of intrastate activities, the Commission has attempted to indirectly assert jurisdiction over wholly intrastate matters. According to IGI, the Commission cannot force the CPUC to modify PG&E's rates.

IGI argues also that the Commission has unduly discriminated against PGT by imposing downstream conditions that have not been imposed on other interstate pipelines serving California. In this regard, IGI explains that PGT is the only interstate pipeline that has had its construction start conditioned upon the CPUC's treatment of the rates of a downstream, wholly intrastate pipeline. IGI submits that postponing the start of the PGT expansion does not promote competition; instead, it shields PGT's competitors from market forces.

IGI states further that the supply requirements of the majority need not be delayed by concerns about Northern California. In this regard, IGI points out that the majority of the gas to be transported by PGT is destined for the Southern California market and therefore construction should not be delayed for the small amounts of gas headed for Northern California.

Northwest Natural states its support of PGT's request to remove the condition in Ordering Paragraph (M) of the August 1, 1991 order. Northwest Natural believes that the Pacific Northwest markets should not be tied to the resolution of the California service and rate issues.

Northwest submits that in this proceeding, the Commission has violated the regulatory division between state regulatory agencies and the Commission by section 1(c) of the NGA. Northwest asserts that the Commission has failed to honor this separation policy and has overstepped its jurisdiction by conditioning the commencement of construction of the PGT project upon the resolution of PG&E's rate service issues which are within the jurisdiction of the CPUC.

San Diego Gas & Electric Company (SDG&E) urges the Commission to eliminate the construction certificate condition in dispute. Generally summarized, SDG&E believes that in utilizing the Commission's certificate conditioning power under the Natural Gas Act to compel a change in intrastate rates which the NGA explicitly removes from the Commission's jurisdiction, the Commission is acting in excess of its lawful authority. SDG&E also believes that the disputed condition seemingly defies the Commission's stated policy to allow the market to decide the appropriate amount and timing of pipeline to be constructed.

In general agreement with the submissions by the CPUC and PGT, The Washington Water Power Company (WWP) urges that the Commission remove the disputed condition from the certificate. WWP states that it is a part of a larger group of shippers in the Pacific Northwest who have requirements for service on PGT that are independent of CPUC jurisdiction. WWP believes that, as such, they are being held hostage to the resolution of California service and rate design concerns. In conclusion, WWP states that this Commission must recognize the difficulties posed for the expansion shippers should there be further delay. Vector Energy Inc. (Vector), an independent oil and gas marketer, submits that if the delays in construction continue, such will result in irreparable economic hardship for Vector.

Vector believes that in light of recent progress and developments made by both the CPUC and PG&E to achieve

numerous Commission objectives, removal of the prohibition is appropriate.

Vector also states that the Commission has contradicted its own stated policy of allowing the market to select the appropriate source of its incremental pipeline capacity by attaching a condition to PGT's certificate which would preclude PGT from commencing construction until the intrastate rate issues are resolved.

Southern California Edison Company (Edison) requests that the construction condition be lifted and states that imposition of the condition is unsupported by the justification given by the Commission and is also an unlawful intrusion into the jurisdiction of the CPUC, in violation of principles of comity. In this regard, Edison states that continued inclusion of this condition would represent a significant impediment to the CPUC's ability to exercise its jurisdiction over intrastate service and rates on both the existing PG&E facilities and the proposed PG&E Expansion Project, regarding both the construction of the new pipeline facilities within California and any changes in the use of PG&E's existing system. Edison states that, moreover, the condition would impose an inequitable competitive handicap on the PGT project which has not been imposed on any other pipeline seeking to serve California.

Edison submits that the arrangement between PGT, PG&E, and the PGT shippers is not a tying arrangement. According to Edison, there is no requirement in the PGT Expansion Project's firm transportation service agreement that requires PGT expansion shippers to obtain capacity on PG&E's expansion project.

Edison believes that the language of the construction condition is based on the false assumption that the competitive problem raised by the Indicated Expansion Project shippers would be resolved if the CPUC were to permit these shippers to cross-over and use alternative means to deliver their gas. Edison states that it is unaware of any means for a PGT Expansion Project shipper to deliver gas from Malin into

Northern California on a firm basis except on the PG&E Expansion Project.

Edison submits further that the cross-over issue is not an access issue but an intrastate rate issue subject to the CPUC's jurisdiction. Edison considers the Commission's treatment of the cross-over prohibition as an access issue as incorrect and inequitable because: (1) the PGT expansion shippers have not established that they have any present preferred rights to firm transportation capacity on the existing PG&E facilities from Malin that could be used to deliver PGT Expansion Project Volumes on a firm basis, and (2) creation of any such right of access for PGT expansion shippers on PG&E's existing system would be unfair and at the expense of others. Edison notes that issues relating to allocation of the use of existing intrastate capacity are pending before the CPUC.

Edison also believes that once the Northern California rate issue is resolved, the cross-over prohibition will disappear since the prohibition is a creation of the expansion project's incremental rate design. Edison states that a rolled in rate will make shippers to Northern California indifferent as to whether they will utilize the existing or expansion PG&E capacity. Edison asserts that jurisdiction to resolve this issue rests with the CPUC.

In conclusion, Edison requests that if the Commission adheres to its belief that the CPUC's actions are unlawful, it should make such conclusions in the form of a separate declaratory order constituting final agency action. If this occurs, the project can go forward while the Commission and the CPUC jointly seek a resolution of their differences.

PG&E states that the issues addressed by the construction condition all relate to the terms of PG&E's intrastate service, over which the CPUC has jurisdiction.

Supportive of the CPUC's comments, PG&E notes that the PG&E Expansion's use of a CPUC authorized uniform postage stamp rate design is currently not discriminatory. It is

the rate design applicable to PG&E's existing as well as to its Expansion Project transportation. It also is the same CPUC authorized intrastate rate design that applies to all existing interstate deliveries and will apply to all new interstate shippers coming to California, regardless of their choice of interstate or intrastate route.

PG&E states that because of perceived discrimination on the PG&E expansion, PG&E has determined to support the prompt implementation of rolled-in treatment for the PG&E's Expansion's Northern California volumes.

On September 25, 1991, Governor Pete Wilson of the State of California filed comments objecting to Ordering Paragraph (M). Governor Wilson submits that the Commission's actions do not amount to a constructive remedy, since the decision may result in the state of California losing 2,000 construction jobs and more than $500 million in taxable revenues during 1992. The Governor states further that there are utilities depending on the gas and that receipt of the gas is critically important to the air quality of the state.

Other Comments

PanCanadian Petroleum Company (PanCanadian) requests that the Commission permit PGT to commence construction within the immediate future and that at the same time the Commission retain as a requirement of the certificate that PGT shippers must have nondiscriminatory access to the California market.

PanCanadian also requests that the Commission modify the August 1, 1991 order to extend the twenty day period for filing responses until after the CPUC has issued a final nonappealable order (*i.e.,* reconsiders its decision authorizing the postage stamp rate and considers some form of rolled-in rate), PGT has reported to the Commission and PanCanadian has had an opportunity to comment on the CPUC's actions.

The Sacramento Municipal Utility District (Sacramento) requests that, since neither PGT, nor this Commission, can

guarantee what the CPUC will decide regarding the rates for the PG&E portion of the expansion, the Commission condition PGT's certificate to require that shippers be allowed to make direct connection to the Expansion Project and avoid any payments for unnecessary and duplicative facilities.

Sacramento would have the Commission accept that the expansion project and the PG&E expansion are separate, stand alone projects with their own identities.

While Sacramento does not oppose rolled-in rates for other Northern California shippers, it states that it would also prefer to have the option of paying a postage stamp rate and taking direct service from the Expansion Project. In this regard Sacramento states that of importance is the ability of the PG&E Expansion to move gas from both the North (*i.e.,* from the PGT expansion) and the South (*i.e.,* from Mojave/Kern River). Sacramento notes, however, that this latter configuration has not been proposed by PG&E. Sacramento believes that the postage stamp rate treatment proposed for the Expansion Project is appropriate for a pipeline that can be used to transport gas in either direction.

Sacramento, however, has expressed concern that PG&E refused its request to take service directly from the Expansion Project. Sacramento believes this denial is based on PG&E's attempt to inhibit potential competition to its LDC function.

Suncor Inc. (Suncor) submits that on the basis of the good faith filings made by PGT and the CPUC, the Commission should permit PGT to commence construction without delay. However, Suncor also requests that the Commission retain as a requirement of the certificate that PGT shippers must have nondiscriminatory access to California markets. Suncor requests further that the Commission continue to exercise regulatory oversight and require PGT to report on the continued progress of the CPUC in resolving these issues.

Suncor notes that it must be candidly observed that what has been committed to at this point in time is a processing of

expedited processing and review. There has been no commitment to a result that would eliminate the discriminatory barriers identified in this proceeding.

IV. Discussion

At the outset, the Commission makes several preliminary observations. First, we do not intend to intrude upon the CPUC's jurisdiction over the California gas market. But the FERC must consider and weigh the impacts of this particular proceeding from a different perspective: that of promoting the *national* market that has emerged for natural gas. This certificate application affects economic interests in a broad area of North America, from domestic producers' ability to market their product, to LDCs and consumers throughout the west paying reasonable prices for their gas supplies. We must therefore look at how this decision relates to the major policy objective the FERC has been pursuing since 1985: promoting an efficient, competitive natural gas market throughout the United States.

Second, this case brings into conflict two important FERC policy objectives—assuring nondiscriminatory access to pipeline facilities, on the one hand, and ensuring the timely consideration and construction of new gas facilities to meet growing gas demand on the other. We have spent a great deal of Commission resources on both.[4] The facts of this case bring these two objectives into sharp conflict. Resolving this dilemma in a fair and responsible manner lies at the heart of our ruling as discussed below.

---

[4] See, *e.g.*, Final Rule, Revisions to Regulations Governing Authorizations for Construction of Natural Gas Pipeline Facilities (Order No. 555), Docket No. RM90-1-000 [FERC Statutes and Regulations P 30,928] (issued September 20, 1991); Notice of Proposed Rulemaking, In Re Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, Docket No. RM91-11-000 [FERC Statutes and Regulations P 32,480], 56 *Fed. Reg.* 38,372 (1991).

Based upon the comments, the Commission finds that further delay in PGT's commencement of construction will prevent the timely delivery of additional gas supplies to the Pacific Northwest and California. We have further determined that our prior order can be modified, without affecting the basis for our determination that PGT's project is required by the public convenience and necessity, to permit the commencement of construction without further delay.[5]

PGT has not demonstrated to our satisfaction, however, that shippers of gas to California markets will not be subject to unduly discriminatory restraints on access to transportation either in California or on PGT's expansion project. We recognize that PG&E currently retains all firm capacity on its system. However, current proceedings before the CPUC may result in other shippers' having the opportunity in the near future to reserve some of PG&E's firm capacity. If shippers are allowed to reserve firm capacity on PG&E's existing facilities, no party has denied that those shippers will not be allowed to use that capacity to receive gas transported through PGT's upstream expansion project.

For example, following the resolution of current proceedings before the CPUC, a shipper may be able to reserve some firm capacity on PG&E's currently existing facilities and use

---

[5] In response to the comments questioning our authority to impose our previous order's condition on PGT's commencement of construction, we emphasize that our modification of that condition is based on our determination that immediate commencement of construction will not compromise our ability to fulfill our responsibility to prevent undue discrimination. If necessary to achieve that statutory mandate, the previous order's condition would be an appropriate exercise of our authority under section 7(e) of the NGA "to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." The Supreme Court has found that the Commission has extremely broad authority under section 7(e) to condition certificates of public convenience and necessity. *See* Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, 388-89 (1959).

that capacity to obtain gas supplies that presently can be delivered to PG&E's system by means of other suppliers' currently existing facilities. The construction of PGT's expansion project may make additional gas sources available to the shipper. The shipper may wish to switch to these newly accessible gas supplies and reserve some of PGT's expansion capacity in order to have the gas transported downstream to PG&E for further transportation by PG&E using the capacity that the shipper reserved before PG&E constructed its expansion project.

Under the CPUC's and PG&E's current policies, this shipper would not be allowed to have the gas transported under the firm contract it entered into prior to PG&E's constructing its expansion project. Thus, the shipper also would have to agree to new contractual arrangements with PG&E for firm transportation service, with the result that the shipper would be required to pay additional demand charges to PG&E, even though the shipper may not have any desire or use for additional firm capacity on PG&E's system. Neither the CPUC nor PG&E have denied that this would be the consequence of their current policies and practices.

Further, the shipper will be required to pay PG&E's postage-stamp rate for transportation in California, regardless of whether its gas is transported one mile or to the southern terminus of PG&E's terminus. Since shippers also will be charged PG&E's applicable local distribution rate, shippers of gas to points north of the expansion project's southern terminus will be paying twice for at least some of PG&E's service.

These restraints on transportation within California will influence shippers' decisions on whether to transport gas on PGT's upstream expansion project. Thus, the restraints may effectively deny some shippers access not only to transportation in California but to PGT's expansion project as well and result in lost markets to those shippers. Further, the current tying of service on PGT's expansion project to service on PG&E's expansion project has the same anticompetitive effects as an

interstate pipeline's refusing to untie or unbundle its transportation services from its sales services, which the Commission has found to be unduly discriminatory.[6]

In view of these findings, we are modifying the condition in Ordering Paragraph (M) of our August 1 order to permit PGT's commencement of construction upon acceptance of its certificate. The revised condition will provide, however, that PGT's rate of return on equity shall be reduced to 10.13 percent until such time that PGT demonstrates that neither its rates or transportation policies or practices nor those of its affiliate, PG&E, result in unduly discriminatory restraints on shippers' access to transportation on PGT's expansion project and transportation service within California.[7]

This revised condition will permit PGT to proceed with the timely construction of facilities to fulfill gas demand that is unquestioned. However, the condition should provide a strong incentive for PGT to work toward the elimination of unduly discriminatory conditions that limit its expansion shippers' access to transportation service. In this case, our condition is

---

[6] *See* Order No. 436., FERC Statutes and Regulations, Regulations Preambles 1982-1985 ¶ 30,665, at p. 31,496 (1985): "This precludes any tying arrangements between transportation and other services unless the bundled transportation services are offered as options to the stand-alone transportation service."

[7] Based on an analysis of then recent interest rates and a discounted cash flow (DCF) study, the Commission found in its January 22, 1990 order in this proceeding that the zone of reasonableness for gas pipelines' rates of return on equity was 10.13 percent to 15.8 percent. 54 FERC ¶ 61,035, at p. 61,151 (1991). That order set forth the Commission's preliminary determination that 12.75 percent would be the appropriate rate of return on equity for purposes of calculating PGT's incremental rates for transportation services using its expansion project. *Id.* However, the Commission subsequently lowered PGT's approved rate of return on equity to 12.50 percent. 56 FERC ¶ 61,192, mimeo at 55 (1991). For the reasons discussed in this order, we are lowering PGT's approved rate of return on equity to 10.13 percent, the low end of the previously determined zone of reasonableness.

made necessary by considerations involving our policy of promoting open-access transportation, to which PGT has committed, our policy of ensuring that an interstate pipeline's relationship with an affiliate does not result in anticompetitive practices, including practices that deny transportation access in an unduly discriminatory manner, and our policy to ensure the timely commencement of new facilities construction where natural gas demand has been shown.

The Commission orders:

(A) The August 1, 1991 order in this proceeding is amended by modifying the condition in Ordering Paragraph (M) of that order to authorize PGT to commence construction upon acceptance of its certificate.

(B) PGT's approved rate of return on equity shall be 10.13 percent until such time that PGT demonstrates that neither its rates or transportation policies nor those of PG&E result in unduly discriminatory restraints on shippers' access to transportation on PGT's expansion project and transportation service within California.

(C) PGT shall file, within thirty days after issuance of this order, revised *pro forma* tariff sheets to reflect a rate of return on equity of 10.13 percent.

By the Commission.

(S E A L)

Commissioner Trabandt dissented with a separate statement to be issued later.
Commissioner Langdon dissented with a separate statement attached.

/s/ LOIS D. CASHELL

Lois D. Cashell,
Secretary

Pacific Gas Transmission Company	}	Docket Nos. CP89-460-000, CP89-460-001, CP89-460-003, CP89-460-006, CP89-460-007, and CP90-1-000

(Issued October 24, 1991)

Jerry J. Langdon, Commissioner, *dissenting:*

The majority has taken the irreconcilable steps of: (1) finding the existence of a discriminatory, anticompetitive arrangement between PGT and PG&E, (2) properly ordering the jurisdictional entity to eradicate the discrimination before construction of the pipeline can proceed, and (3) then, without legal justification, authorizing both construction and operation of the pipeline in spite of the discrimination.

In effect, the majority has in fact openly approved of the *implementation of the discriminatory arrangement,* all the while acknowledging that the discrimination will be perpetuated as a result of this Commission order, but can be eliminated only as a result of hoped-for, but certainly not yet promised, action by the CPUC. To further embellish this twisted line of reasoning, the order attempts to "encourage" PGT to eradicate the discriminatory arrangement being approved by this Commission by reducing PGT's rate of return to the lower range of the zone of "reasonableness." Even as a non-lawyer, I think I could easily find grounds to appeal this order.

As Judge Williams pointed out in *AGD I,*[1] the Natural Gas Act " fairly bristles with concern for undue discrimination." He further points out that the Commission is *directed* by section 5 of the NGA to adopt corrective measures whenever it finds a practice to be unduly discriminatory.[2] Today's order not only

[1] 824 F.2d 981, 998 (D.C. Cir. 1987).

[2] *Id.*

fails to stamp out discrimination where it has been discovered, but goes further awry by actually authorizing the implementation of that unduly discriminatory practice.

For these reasons I respectfully dissent.

Jerry J. Langdon
Commissioner

[¶ 61,192]

Pacific Gas Transmission Company Docket Nos. CP89-460-003, CP89-460-006, CP89-460-000, CP89-460-001, CP90-1-000, and CP89-460-001

Order Issuing Certificate, Granting and Denying in Part Rehearing and Clarification

(Issued August 1, 1991)

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler, Jerry J. Langdon and Branko Terzic.

I. Introduction

This order addresses several related proceedings involving Pacific Gas Transmission Company (PGT). Namely, we consider herein requests for rehearing of a January 22, 1991 order[1] in Docket No. CP89-460-003 filed by the Amoco Affiliates,[2] Altamont Gas Transmission Company (Altamont), Bonus Energy, Inc. (Bonus), BP Resources Canada Limited (BP Resources), Canadian Producers,[3] El Paso Natural Gas Company (El Paso), Expansion Shippers,[4] Kern River Gas Transmission Company (Kern River), NATGAS U.S. Inc. (NatGas),

---

[1] *Pacific Gas Transmission Company,* 54 FERC ¶ 61,035 (1991).

[2] The Amoco Affiliates consist of Amoco Canada Petroleum Company Ltd. and Amoco Production Company.

[3] The term refers collectively to North Canadian Marketing Corporation, American Hunter Exploration Ltd., and Suncor, Inc. The Canadian Producers also sought rehearing jointly with the other Expansion Shippers. (See note 4, *infra.*)

[4] The members of the Expansion Shippers are: the American Hunter Exploration, Ltd.; Bonneville Fuels Corporation; Cities of Burbank, Glendale and Pasadena, California; North Canadian Marketing Corporation; Northwest Natural Gas Company; Pancontinental Oil Ltd.; San Diego Gas & Electric Company; Southern California Edison Company; Suncor, Inc.; and Washington Water Power Company. Several of these shippers also filed separate requests for rehearing.

Producer Associations, PGT, Pacific Interstate Transmission Company (Pacific Interstate) and Southern California Gas Company (SoCal) (jointly); San Diego Gas & Electric Company (San Diego), Southern California Edison Company (Edison), and Union Pacific Resources Company (Union Pacific).

Also considered is a request for rehearing filed on April 15, 1991, in Docket No. CP89-460-006, by Edison of a Commission order issued on March 15, 1991, in Docket No. CP89-460-002.[5] There, the Commission granted an emergency request for clarification of the January 22, 1991 order to permit PGT to promptly conduct a new open season for the reallocation of expansion capacity without awaiting the conclusion of the remaining procedures contemplated by the January 22, 1991 order. In addition, the March 15 order directed PGT to resubmit several pro forma open-season-related tariff sheets that contained new provisions or revised other tariff sheets which did not conform with the terms and conditions of the January 22 order.[6]

Also addressed in this proceeding is an application filed in Docket No. CP89-460-007 by PGT to amend its application preliminary determination issued in the January 22, 1991 order. Generally, the amendment reflects: (1) PGT's new shippers resulting from its open season conducted pursuant to the Commission's January 22, 1991 order, (2) the contract quantities and

---

[5] *Pacific Gas Transmission Company,* 54 FERC ¶ 61,291 (1991).

[6] PGT filed its pro forma tariff sheets governing the open season and the allocation of capacity on its proposed expansion on January 31, 1991. Also, on February 20, 1991, in Docket No. CP89-460-004, as supplemented on February 22, 1991, PGT also filed other pro forma tariff sheets in response to the Ordering Paragraphs (D), (E), and (L) of the January 22 order. The latter tariff sheets were not addressed in the March 15 order because, they did not pertain to the open season and the allocation of capacity on the proposed expansion project. They are, however, addressed in this order. On March 25, 1991, in Docket No. CP89-460-005, PGT submitted revised pro forma tariff sheets in purported compliance with the Commission's directive of the March 15 order.

related receipt and delivery points, (3) the costs of PGT's facilities which were originally stated in 1988 dollars and the initial rate, and (4) PGT's revised tariff sheets.[7]

The Commission has since completed its environmental analysis of the PGT expansion project. For this and other reasons discussed below, we shall grant PGT a certificate with appropriate modifications and conditions, consistent with its application as supplemented by the amendment. In addition, we shall grant an NGA section 3 authorization and a Presidential Permit. We shall deny, in part, and grant, in part, the requests for rehearing and require PGT to modify the newly submitted tariff sheets consistent with the discussion below.

II. Background

A. *Overview of the Original Proposal, as Amended*

1. *Original Application*

On December 8, 1988, PGT filed an application in Docket No. CP89-460-000, pursuant to section 7(c) of the NGA, for a certificate to construct and operate a substantial expansion of its existing pipeline system and to provide firm interstate transportation for certain large utility customers located in the Pacific Northwest and California. PGT requested to transport up to 710 MMcf per day of gas, on a firm basis, from Kingsgate, British Columbia. Under the proposal, approximately 150 MMcf per day of gas would be delivered on a firm basis to the Pacific Northwest and 600 MMcf per day of gas on a firm basis would be delivered to an existing interconnection with Pacific Gas and Electric Company (PG&E),[8] at Malin, Oregon. The

---

[7] PGT's original expansion application, filed on December 8, 1988, was previously amended on October 3, 1989. As used in this order, the term "original application" refers to the application as amended in 1989. The term "amendment" refers to the original application as amended on May 9, 1991.

[8] PG&E is the parent corporation of PGT.

deliveries to California would be effected through an expansion of the PG&E system.[9]

2. *The October 1989 Amendment*

Subsequently, on October 3, 1989, PGT filed in Docket No. CP89-460-001 an amendment to its application to reflect the fact that capacity on the expansion project[10] was fully subscribed through the execution of exclusive precedent agreements. PGT's amendment altered the design of the proposed facilities in order to increase the volumes delivered and to provide seasonal service. The revised facility proposal included 430 miles of 42-inch diameter looping on PGT's existing system, instead of the 36-inch diameter looping as proposed in its initial application. Under the amendment, PGT also planned to add additional delivery points in order to provide interruptible transportation service and to revise its proposed receipt and delivery points.

3. *The Settlement*

On November 8, 1989, PGT filed, in Docket No. CP89-460-001, an Offer of Settlement (Settlement) reached by PGT and the transportation customers to be served by the expansion project. The Settlement included a Stipulation and Agreement between PGT and its expansion shippers, although no other parties participated in the settlement negotiations.

4. *The Presidential Permit and Section 3 Authorization*

On October 3, 1989, PGT filed an application for section 3 authorization and a Presidential Permit to construct, operate, maintain and connect proposed additions or modifications to its facilities operated at the international boundary between Canada and the United States for the service proposed in Docket No. CP89-460-000 *et al.*

---

[9] See January 22, 1991 order, mimeo at 5, ftn. 10 for explanation.

[10] In this order the term "expansion project" is used to refer to PGT's application, as amended.

B. *The January 22, 1991 Order*

In the January 22, 1991 order, the Commission preliminarily approved PGT's proposal to expand its existing facilities which will interconnect with other pipelines to transport Canadian gas to the Pacific Northwest and to Southern California. The authorization would allow PGT, on a firm annual basis, to receive: (1) approximately 872 MMcf per day of natural gas at Kingsgate, British Columbia, and (2) approximately 62 MMcf per day of gas at Stanfield, Oregon. PGT would then be authorized to deliver approximately 150 MMcf per day of gas to customers in the Pacific Northwest and approximately 766 MMcf per day of gas to an existing interconnection with its parent, Pacific Gas & Electric (PG&E), at Malin, Oregon. The 62 MMcf per day of gas received at Stanfield would require upstream transportation by Northwest Pipeline Corporation (Northwest).[11]

The order also rejected the settlement but preliminarily approved PGT's application for NGA section 3 authorization and a Presidential Permit. In addition, in view of a determination in the January 22, 1991 order that PGT had unduly discriminated against nonutility shippers in its allocation of initial capacity, PGT was directed to establish new open-season procedures for the initial allocation of the firm expansion capacity, and to include such procedures in its tariff. Final certificate authority was reserved pending completion of the environmental review then being conducted of PGT's proposal.

Finally, the order imposed several "at risk" conditions on:

(1) To the extent that PGT's actual cost of service exceeds the estimated cost of service on which these initial rates are based, PGT shall assume the risk for any undercollection;

---

[11] On December 31, 1990, Northwest filed an application for a certificate of public convenience and necessity in Docket No. CP91-780-000 which includes the construction of facilities to provide the transportation of the 62 MMcf per day of gas to PGT at Stanfield. A preliminary determination was issued in the proceeding on July 1, 1991.

(2) PGT shall be required to bear the responsibility for any shortfall in cost recovery if the Canada NEB fails to grant export authority of sufficient duration and volumes to allow for the recovery of the costs of the facilities approved herein. In that event, the applicants are explicitly prohibited from shifting any of the costs associated with the facilities authorized herein onto any of their other customers, unless it is proved that the customers are using the facilities. This same provision shall apply to the import authority ultimately granted by DOE/FE to the shippers if that import authority proves to be of shorter duration or a lower volume than necessary for the recovery of costs associated with the facilities and services authorized herein; and

(3) PGT shall also be required to bear the responsibility for any shortfall in cost recovery should Foothills or ANG be unable to fully construct facilities to provide full deliveries of PGT's expansion volumes. In that event, PGT is explicitly prohibited from shifting any of the increased costs resulting from the reduced Foothills or ANG's volumes onto any of its customers.

III. The Certificate Amendment Application

On May 10, 1991, PGT filed an amendment to its application approved by the Commission in the January 22, 1991 order. PGT states that in compliance with the directive of the January 22, 1991 order, it conducted its new open season from February 21 to March 22, 1991. PGT asserts that as a result of the open season, the expansion is fully subscribed by utilities, marketers and producers. PGT states that one of the purposes of its amendment is to reflect the names of all the new open-

season shippers, their contract quantities, and related receipt and delivery points, which are as follows:

California

	Annual MMMBtu/d
Kingsgate to Malin, Oregon:	
CanWest Gas Supply USA Inc.	27.4
Chevron U.S.A. Inc.	31.3
City of Burbank	4.8
City of Glendale	4.0
City of Pasadena	4.0
Dekalb Energy Co.	11.8
NATGAS U.S. Inc.	58.8
Norcen Marketing Inc.	47.0
North Canadian Marketing Corp.	19.6
North Canadian Oils Ltd.	39.2
Northern California Power Agency	5.5
Northridge Alberta Gas Sales Ltd.	8.1
PanCanadian Petroleum Ltd.	40.3
Pancontinental Oil, Ltd.	4.0
Paramount Resources U.S. Inc.	19.6
Petro-Canada Hydrocarbons Inc.	19.6
Sacramento Municipal Utility District	12.0
Salmon Resources Ltd.	27.4
San Diego Gas & Electric Company	52.5
Southern California Edison Company	201.7
Suncor Inc.	40.4
Vector Energy Inc.	16.7
Washington Energy Exploration	19.6
Kingsgate to Malin Subtotal:	715.3
Stanfield to Malin, Oregon:	
CanWest Gas Supply USA Inc.	35.00
BP Resources Canada Limited	10.25
CanWest Gas Supply Inc.	16.52
Stanfield to Malin Subtotal:	61.77
Total California	777.07

Pacific Northwest:	
Washington Water Power Co.	42.42
Cascade Natural Gas Corp.	3.73
IGI Resources, Inc.	7.16
Northwest Natural Gas Co.	38.28
Chevron U.S.A. Inc.	20.00
Washington Energy Exploration	35.34
CP National Corp.	3.31
Pacific Northwest Total:	150.24
Total PGT Expansion:	927.31

PGT notes that it previously requested authorization to make deliveries in the Pacific Northwest at Spokane, Washington; Wallula, Washington; Stanfield, Oregon; and Hermiston, Oregon; with the possibility of adding additional delivery points based on the needs of specific customers. PGT states that it allowed the bidders in the new open season to tender bids to any existing delivery point on the PGT system.[12]

A. *Costs*

The proposed facilities as reflected in the amendment have not changed. In its 1989 amended application, PGT estimated that the capital costs for the expansion project, on a fourth quarter 1988 cost basis, would be $635,050,000. In the instant amendment, PGT projects that the cost for the expansion project would be $808,600,000 (based on 1993 dollars). We have reviewed PGT's cost revision and concur with the methodology utilized.

B. *Rates*

PGT's amendment includes alternate tariff sheets which have been revised to reflect the adjusted expansion project costs. PGT proposes to use Alternate A tariff sheets—which are based on the rate design (100 percent reservation charge) and return on equity (14.0 percent) proposed by PGT in its 1989 amended application and in its request for rehearing of the

[12] See Appendix A attached to this order.

January 22, 1991 order, if the Commission grants rehearing on the issues of PGT's proposed rate design and return on equity. On the other hand, states PGT, Alternate B tariff sheets—which are based on the rate design and return on equity approved by the January 22, 1991 order, would be used if the Commission denies rehearing of PGT's rate design and return on equity.

C. *Markets*

PGT has provided market data from its new shippers following the same format as used by the original shippers. We make the following conclusions after our review of the market data submitted by the new shippers coming out of the open season. We observe that PGT has signed 30-year contracts with all but three of its shippers[13] for this service, while some of the shippers will be providing interruptible sales service and almost all are supported by only 2-year blanket import authority from the Department of Energy—Office of Fossil Energy (DOE/OFE).[14] No sales contracts have been provided between the shippers and their market(s). Some of the shippers will use the firm service to firm-up current interstate services which are interruptible. However, many will also be using the firm service to provide sales to heretofore interruptible customers. A few of the new shippers, representing 9% of the project volumes, have provided no market data at all: these are Paramount Resources, Northridge Alberta, Vector Energy and PanCanadian Petroleum Ltd.

In our original market study in this proceeding, it was determined that there is market in southern California sufficient to support this project. However, the new open season has displaced some of the original shippers. Presumably some of these new shippers will be serving that market given up by some of the original shippers who have received less transportation

[13] BP Resources (16-year), CanWest Supply (16-year), and IGI Resources (20-year).

[14] Most of the shippers either have or have pending applications for short-term (2-year) blanket import authority with the OFE.

capacity than requested. But this cannot be ascertained with any specificity from the market data.

Several of the new shippers provided complete market data: Chevron's California volume (31.3 MMMBtu/d), CP National, Northern California Power Agency, and Sacramento MUD. The new shippers who have not clearly established market need are: CanWest and CanWest USA, Dekalb Energy, Norcen Marketing, North Canadian Oils, Northridge Alberta Gas Sales, PanCanadian Petroleum, Paramount Resources Ltd., Petro-Canada, Washington Energy Exploration, and Vector Energy. These shippers represent 36% (336 MMMBtu out of 927 MMMBtu/d) of the project volumes.

We are concerned that most of the new shippers have not shown market data sufficient to support a finding of market need. While PGT's original shippers were utilities and LDCs who serve their own market, many of the new shippers are marketers serving the interruptible spot market. We are thus presented in this case with what appears to be *spot sales* to justify a market for individual, specific section 7(c) transportation authorities. Even though these shippers have provided market data, the data show that interruptible markets will be served with the new PGT expansion service and that some of the shippers are even marketers selling to marketers (purely spot sales).

Inasmuch as PGT's shippers propose to make spot and/or interruptible sales, there is always the possibility that these volumes may not materialize, even though contracts have been signed. PGT should be aware that if the volumes do not materialize, PGT is not guaranteed cost recovery and would not necessarily be allowed to allocate the cost of the facilities to other customers unless it could show that the facilities were in fact being used for the benefit of these customers.

D. *Sale for Resale*

The transportation certificate shall be conditioned upon PGT's shippers having the necessary long-term sale for resale

authority. PGT has identified CanWest and IGI Resources as requiring sale for resale authority; staff believes that Dekalb Energy also requires sale for resale authority. PGT states that CanWest has already received sale for resale authorization in Docket Nos. CP89-338-001 and CI91-5-000 (blanket unlimited term). We note that IGI Resources also has certificate authority in Docket No. CI90-124-000 (blanket unlimited term). The transportation authorization issued in this proceeding shall be conditioned, as so conditioned in the January 22, 1991 order, upon all shippers requiring sale for resale authorization to have such authorization. This certificate shall also be conditioned on the following:

(2) The certificate issued herein shall also be conditioned on all of PGT's shippers having the requisite sale for resale authority.

E. *Supply*

Moreover, we note that the majority of PGT's shippers have or have applied for short-term (2-year) blanket import authority. However, only two shippers (IGI and Salmon Resources) have been identified as having long-term import authority of 15 years. In light of these supply arrangements of questionable duration, we will condition the certificate as follows:

> PGT shall be required to bear the responsibility for any shortfall in cost recovery if the Canadian NEB fails to grant export authority of sufficient duration and volumes to allow for the recovery of the costs of the facilities approved herein. In that event, the applicants are explicitly prohibited from shifting any of the costs associated with the facilities onto any of their other customers. This same provision shall apply to the import authority ultimately granted by DOE/FE to the shippers if that import authority proves to be of shorter duration or a lower volume than necessary for the recovery of costs associated with the facilities and services authorized herein.

F. *Upstream Transportation*

In reviewing PGT's amended application, we were concerned that the volumes designated to be received from Northwest Pipeline by PGT at Stanfield would match the corresponding volumes designated by Northwest in its expansion application in Docket No. CP91-780-000 to be delivered to PGT at Stanfield. In Northwest's application the shippers who would have their volumes delivered to PGT at Stanfield were PGT (about 51.5 MDth/d) and BP Resources (about 10.4 MDth/d). We note that BP Resources was included in PGT's original shipper list to have volumes received at Stanfield; however, PGT was not itself listed as a shipper on its own project.

On May 6, 1991, PGT responded to a data request made by Commission staff about this issue of matching upstream deliveries with receipts. PGT responded that the final allocation of capacity from Stanfield to Malin on the PGT expansion as a result of the new open season is as follows:

CanWest Gas Supply USA, Inc.—35,000 MMBtu/d

CanWest Gas Supply, Inc.—20,702 MMBtu/d

BP Resources Canada Ltd.—6,063 MMBtu/d

PGT stated that Commission staff had correctly noted that the upstream capacity of 61.9 MDth/d on Northwest, which is compatible with PGT's capacity from Stanfield to Malin of 61,765 MMBtu/d, is currently held in the names of PGT and BP Resources. However, PGT has given notice to Northwest that pursuant to Section 4.2 of the transportation contract between the two companies, PGT would like to terminate the contract so that Northwest can reallocate the 51.5 MDth/d of capacity. PGT understands that CanWest is the only party which has a current request lodged with Northwest for Sumas to Stanfield service, so a reallocation from PGT to CanWest will be straightforward (i.e., CanWest is the next party in line for this capacity in Northwest's queue).

In addition, to facilitate the upstream/downstream matching of CanWest's and BP Resources' respective capacities on

Northwest and PGT, PGT and CanWest have agreed to amend CanWest's firm transportation agreement to reduce CanWest's allocation on PGT by 4,187 MMBtu/d. That capacity would be available to BP Resources, the next shipper on the Stanfield to Malin open season queue. Thus, BP Resources' final PGT quantity will be 10,250 MMBtu/d, consistent with its open season request and its upstream Northwest capacity of 10.4 MDth/d. In light of further inquiry accordingly, our initial reservations are resolved.

IV. Interventions

After due notice by publication in the *Federal Register* on May 22, 1991, in Docket No. CP89-460-007 (56 Fed. Reg. 23,576), timely and late petitions to intervene were filed by the parties identified in Appendix B of this order. By operation of Rule 214 of the Commission's Rules of Practice and Procedure, timely, unopposed motions to intervene are granted automatically. For good cause shown and because we do not perceive any prejudice or delay that would be caused by granting the late motions, we will grant the late motions to intervene.[15]

Several intervenors also filed protests and supplemental protests to the amendment. Among other things, they raise issues similar to those raised by the petitioners on rehearing which concern:

1. PGT's failure to comply with the Alaska Natural Gas Transportation Act of 1976 (ANGTA) 15 U.S.C. § 719 et seq;

---

[15] The U.S. Environmental Protection Agency (EPA) submitted comments on the Final Environmental Impact Statement. In large measure, these comments were a reiteration of EPA comments on the Draft EIS, to which we responded to in the Comments/Responses Volume of the Final EIS. In addition, comments were filed by Mr. Arthur J. Scott, a private landowner along PGT's route, requesting that the Commission reexamine PGT's decision to utilize its proposed John Day Canyon Variation route instead of its existing alignment in the John Day Canyon area. The Commission will consider both the EPA's and Mr. Scott's comments below, in the environmental section of this order.

2. PGT's failure to demonstrate the existence of market need or committed supplies to support the expansion project;

3. the denial of due process rights of interested parties to pursue relevant discovery and to file testimony on genuine issues of material fact;

4. PGT and PG&E's failure to bear the economic risks associated with the project;

5. the appropriate rate design for the expansion project and the need to eliminate, prior to construction, any possibility that existing customers may in the future be required to subsidize the cost of the expansion project;

6. reasons why PG&E was dropped as a shipper in the amended application when, until recently, PG&E was claiming that it needed additional capacity to serve its market needs;

7. PG&E's proposed rate design and the unduly discriminatory impact of such on interstate transportation;

8. the discriminatory and anticompetitive nature of PGT's bidding process and the new open season held during February and March 1991;

9. PGT's failure to provide all parties the same market and supply information provided to Commission staff on May 6, 1991;

10. PGT's disregard for its open season rule prohibiting multiple bids;

11. PGT's acceptance of bids from affiliates (*e.g.,* North Canadian Oils and North Canadian Marketing);

12. PGT's failure to modify tariff provisions governing payment of reservation charges as ordered by the Commission;

13. PGT's failure to comply with the Commission's order respecting capacity brokering; and

14. PGT's initial rate increase in violation of the January 22 order.

15. PGT's tying of its interstate capacity with PG&E's intrastate capacity.

V. Discussion

The first part of this order will consider and evaluate the environmental issues raised by PGT's application. Protests to the filing of PGT's amended application and requests for rehearing of the January 22, 1991 application were received by this Commission. The rehearing requests will be responded to next, followed by a discussion of the protests to PGT's amended application.

Before beginning our discussion, we note the following. The Commission will soon consider a final rule in Docket No. RM90-1-000. Among other things, the rule will address issues of risk allocation and rates related to new construction. Under the circumstances, it would be premature to address such issues as they have arisen on rehearing in the present case. Nevertheless, other issues are ripe for final resolution. Accordingly, we will issue a certificate and address environmental and other issues that will not be affected by the pending rule. We will continue to toll the issues that may be affected by the rule and will issue an order addressing them as soon as possible after a decision in that proceeding.

1. Environmental Analysis

An Environmental Impact Statement (EIS) for the PGT/PG&E Expansion Project was prepared.[16] The PGT/PG&E Expansion Project consists of two separate projects—PGT's interstate facilities, and PG&E's intrastate facilities. PGT's facilities begin at the Canadian border, and extend through Idaho, Washington, and Oregon, to a terminus just inside the California border. PG&E's facilities are located entirely within

[16] See PGT/PG&E and Altamont Natural Gas Pipeline Projects, Final Environmental Impact Statement, Volumes I through IV, published May 1991, by the Federal Energy Regulatory Commission (Final EIS).

California, and extend from an interconnection with PGT at the Oregon/California border to Kern County, in southern California. The EIS considered the environmental impacts of both the PGT interstate and PG&E intrastate facilities, as discussed below.

The EIS addressed the need for the proposal, cultural resources, threatened and endangered species, erosion and sedimentation control, revegetation of disturbed areas, blasting, geologic hazards, groundwater, impact on water supplies and water quality, pipeline construction through wetlands and streams, wildlife and fisheries, land use, forests, impact on residences, recreation, socioeconomic impacts, air and noise quality, visual impacts, pipeline safety, alternatives to the proposed routes, cumulative impacts, project-specific routing and siting alternatives, system alternatives, the no-action alternative, and other concerns in the project area. The document recommended that the Commission include 48 environmental mitigation measures in any certificate issued to PGT.

Based on information provided by PGT and further developed from field investigations, literature research, alternatives analysis, and contacts with federal, state, and local agencies, public interest groups, and individual members of the public, the Final EIS concluded that construction of the proposed PGT project would result in a limited, although in some cases significant, adverse environmental impact. Most of this impact would occur during the construction period. However, the Final EIS concluded that the proposed project would be environmentally acceptable if constructed and operated in accordance with the environmental recommendations contained in the Final EIS. The Commission concurs with this conclusion.

Several important factors were considered closely in our determination. A major consideration was the extent to which the Final EIS was able to recommend modifications to the proposed pipeline alignment or develop mitigation which minimized impact on wetlands, visual resources, historic areas, threatened or endangered species, sensitive stream crossings,

and other areas of concern. Where the Final EIS recommends additional studies, significant impacts would either be avoided or mitigated to nonsignificant levels. Our determination of environmental acceptability would therefore be unaffected by the outcome of the recommended studies, which typically results in further site-specific mitigation and further reduction of impacts.

The Commission has carefully reviewed the information and analysis presented in the Final EIS, as well as the conclusions regarding potential environmental impact and environmental acceptability. In addition, the Commission has considered all comments filed on the Draft and Final EIS, as well as our staff's responses to these comments. Based on our careful consideration of this information, the Commission concurs with the findings presented in the Final EIS, and concludes that the PGT/PG&E Expansion Project, if constructed and operated in accordance with the recommended mitigation measures contained in the Final EIS, is environmentally acceptable. Therefore, the Commission shall include the environmental mitigation measures as conditions to the certificate issued to PGT. These environmental mitigation measures are listed in Appendix C of this order.

A. *Background*

Since the proposed PG&E facilities are intrastate facilities, the CPUC, rather than the Commission, has jurisdiction over those facilities. Nevertheless, under NEPA, the Commission is required to consider the environmental impacts associated with those facilities, since they constitute an integral part of the Expansion Project. Under California's state certification procedures,[17] PG&E must comply with the California Environmental Quality Act (CEQA), and the CPUC is required to prepare an environmental impact report (EIR) for the PG&E segment of the Expansion Project.

---

[17] *See California Public Utilities Code,* sections 1001 *et seq.*

On June 13, 1989, the Commission and the CPUC entered into a Memorandum of Understanding (MOU) to combine their efforts to prepare a joint Environmental Impact Report/ Environmental Impact Statement (EIR/EIS) in accordance with NEPA and the CEQA for the proposed PGT/PG&E Expansion Project.

On August 14, 1989, the Commission published in the *Federal Register*[18] a Notice of Intent (NOI) to prepare a joint EIR/EIS for the PGT/PG&E Expansion Project and announced tentative scoping meeting dates and locations.[19] Notification of the schedule for public scoping meetings to be held jointly with the CPUC on the proposed project was published by the Commission in the *Federal Register* on September 5, 1989.[20]

Public scoping meetings were held during September 1989 to determine the significant issues and concerns associated with the project. These meetings supplemented written comments received as a result of the NOI. Scoping meetings for the PGT/ PG&E Expansion Project were held in Antioch, California; Bend, Oregon; and Spokane, Washington. An initial inspection of the proposed PGT/PG&E route was also conducted at this time.

The Commission acted as the lead federal agency for preparation of the EIS in compliance with the requirements of NEPA and the Council on Environmental Quality regulations for implementing NEPA.[21] Early in the scoping period, several agencies expressed an interest in cooperating with the Commission staff in preparing the EIR/EIS. These agencies included the U.S. Department of Agriculture's Forest Service, the Department of the Interior's Bureau of Land Management, and the U.S. Department of Energy.

---

[18] 54 Fed. Reg. 33,272 (August 14, 1989).

[19] The CPUC issued a separate Notice of Preparation on August 8, 1989 to all agencies and persons likely to be interested in the PG&E segment of the PGT/PG&E Expansion Project.

[20] 54 Fed. Reg. 36,855 (September 5, 1989).

[21] 40 C.F.R. § § 1500-1508.

From June 1989 to May 1990, the Commission staff and the CPUC worked together preparing the initial chapters of the joint EIR/EIS. In May 1990, it was decided that for regulatory purposes each agency would prepare its own environmental document for separate use by each respective agency. In essence, the baseline environmental data collected to that date would still be used jointly by both agencies; however, each agency would conduct its own independent analysis of the baseline data, and reach its own independent conclusions and recommendations. On June 29, 1990, the CPUC issued its Draft EIR for public comment. Local public meetings to receive comments on the Draft EIR were held in California. On November 19, 1990, the CPUC issued its Final EIR.

B. *Standards of Review of PG&E Facilities*

The Commission's staff eliminated duplication between our NEPA efforts and California's CEQA efforts, as encouraged by sections 1506.2, 1506.3, and 1506.4 of the CEQ regulations for implementing NEPA, by incorporating by reference the CPUC EIR (which addressed the PG&E portion of the PGT/PG&E Expansion Project) in its Draft EIS. In the instant case, the CPUC conducted the "hard look" at these facilities, as required by both NEPA and the CEQA. This mechanism for avoiding repetition and eliminating duplication was one of the provisions of the MOU, as amended on October 9, 1990. The EIS also examined the potential impact of PG&E's nonjurisdictional facilities on cultural resources and on federally listed endangered and threatened species resources.[22]

[22] The issue of the Commission review of the effects of nonjurisdictional facilities that are incident to jurisdictional facilities is being evaluated in the rulemaking in RM90-1-000.

C. Preparation of the Environmental Impact Statement

On January 11, 1991, the Commission issued the *PGT/PG&E and Altamont Natural Gas Pipeline Projects Draft Environmental Impact Statement* (Draft EIS). Notification was published in the *Federal Register* both by the Commission (56 Fed. Reg. 1623) and the U.S. Environmental Protection Agency (56 Fed. Reg. 2017) on January 16 and 18, 1991, respectively. Approximately 700 copies of the Draft EIS were circulated to various federal, state, and local government agencies, elected officials, environmental groups and organizations, universities, local libraries, private citizens, applicants, and environmental intervenors to the FERC's proceeding. In addition, approximately 1,400 copies of an Executive Summary were sent to property owners directly affected by the projects, as well as some 600 summaries to other environmental groups, organizations, and the media.

During the latter part of February 1991, additional public meetings were held in the project areas to receive public comment on the Draft EIS. The Commission published notification of the public comment meetings in the *Federal Register* (56 Fed. Reg. 4274) on February 4, 1991. Public meetings were held along the PGT route in Bend, Oregon and Bonners Ferry, Idaho.

On May 24, 1991, the Commission issued the *PGT/PG&E and Altamont Natural Gas Pipeline Projects Final Environmental Impact Statement* (Final EIS). Notification was again published in the *Federal Register* both by the U.S. Environmental Protection Agency (56 Fed. Reg. 23,900) and the Commission (56 Fed. Reg. 25,090) on May 24 and June 3, 1991, respectively. As part of the Final EIS, the staff prepared a Comments/Responses Volume which presented public comments received on the Draft EIS, as well as responses.[23] Overall, the Commission

[23] On June 7, 1991, the Commission issued an errata to the Final EIS which contained two letters of comment and the staff's responses, which were inadvertently omitted from the Comments/Responses Volume of the Final EIS.

received over 115 letters of comment from federal, state, and local agencies, intervenors, environmental groups, landowners, the media, and other interested parties. The numerous comments received were instrumental in revising and refining the analysis presented in the Draft EIS.

Approximately 750 copies of the Final EIS were circulated to various federal, state, and local government agencies, elected officials, environmental groups and organizations, universities, local libraries, private citizens, applicants, and environmental intervenors to the FERC's proceeding. In addition, approximately 1,400 copies of an Executive Summary were sent to property owners directly affected by the projects, as well as some 600 summaries to other environmental groups, organizations, the media, and the remaining parties to the Commission's proceedings.

D. *Final EIS*

As discussed above, the Final EIS was published by the Commission in May 1991. The Final EIS consists of four volumes which include the EIS itself, Comments/Responses on the Draft EIS, Maps, and Appendices.

In the Comments/Responses volume the Commission has published—verbatim—all of the comments received on the Draft EIS. These include all comments received from federal, state, and local agencies; groups and individuals; the applicants; intervenors, late comments, and also summaries of public meeting transcripts. The Commission staff's response to each comment—line by line—is printed immediately adjacent to the comment. The line-by-line staff responses indicate how each comment was resolved by the staff. The responses indicate how the comment was reflected in the Final EIS, or otherwise resolved. The following discussion summarizes some of the more significant topics addressed in the Final EIS.

1. *Jurisdictional statements regarding PG&E's facilities*

On June 20, 1991, El Paso filed a motion which seeks clarification that certain conclusions contained in the Commission's Final EIS (and the notice thereof) regarding the scope of the Commission's jurisdiction over the PG&E expansion project facilities south of Malin do not determine Hinshaw status issues pending for resolution. Specifically, it states that the Final EIS presumes that the CPUC has jurisdiction over the facilities and service south of Malin and repeatedly references "PG&E's nonjurisdictional facilities."[24] Similarly, states El Paso, the notice of the availability of the Final EIS asserts that expansion project facilities south of Malin are "nonjurisdictional."[25]

El Paso's motion is moot since earlier in this order we have affirmed the subject jurisdictional references noted by El Paso.

2. *Need for the Pipeline and the No-Action Alternative*

The Final EIS discusses the need for the PGT/PG&E Expansion Project in the context of the No-Action Alternative. Under the No-Action Alternative, the Commission would not authorize the Expansion Project. The No-Action Alternative assumes that if the Commission were to deny authorization to PGT, then its portion of the PGT/PG&E Expansion Project would not be constructed. It is assumed that the lack of upstream facilities would have the effect of avoiding construction of the PG&E portion of the project as well. As a result, Commission denial of PGT's authorization would not only avoid the construction and operational impacts associated with PGT's portion of the project, but also those associated with PG&E's portion.

---

[24] *Citing* PGT/PG&E and Altamont Natural Gas Pipeline Projects Fina Environmental Impact Statement, Pacific Gas Transmission Company, *et al.* (May 1991) S-1, 1-15.

[25] *Citing* Notice of Availability of the Final Environmental Impact Statement for the PGT/PG&E Expansion-Altamont Natural Gas Pipeline Projects, Pacific Gas Transmission Company, Docket No. CP89-460-000 *et al.* (May 24, 1991), at 2.

If the proposed project was not constructed, the projected need for energy services in the markets that the project proposes to serve would have to be met by other means or go unmet. This would result in one of the following two scenarios: either alternative projects would be implemented to meet part or all of the projected need, or no action would be taken to meet the projected need. If additional supplies of natural gas were not made available, existing energy sources and/or conservation efforts would continue to be used. Natural gas would not be available to supplement these sources or for fuel switching. The impacts associated with construction and operation of the proposed project would not occur. The benefits of increased gas use in attaining air quality standards for California in the future could be effected if other fuels, such as oil, were used instead of gas.

The potential would also exist for energy demand to exceed available supply, thus driving up energy prices and exerting an indirect limiting effect on growth. This could result in either positive or negative impacts on resources, depending on how policymakers and end users deal with a curtailment in future natural gas availability. Indirect impacts on biological resources may be positive in that future land disturbance would be curtailed. If, on the other hand, alternative projects were implemented, each could result in its own set of specific impacts which could be greater than those associated with the current proposals.

3. *System Alternatives*

The Commission's EIS considered ten system alternatives that could potentially provide most or all of the proposed natural gas services to California. The initial list of alternatives was based on applications submitted to the Commission and the CPUC, previous studies, and public scoping meetings conducted for this EIS. These potential system alternatives were then screened to determine if they met several initial criteria. Potential system alternatives to the PGT/PG&E Expansion Project which were evaluated to determine if they satisfied the

initial screening criteria included the following projects: Mojave Pipeline Project, Kern River Pipeline Project, Joint Mojave-Kern River Pipeline Project, WyCal I Pipeline Project, WyCal II Pipeline Project, El Dorado Interstate Transmission Company Project, Southcoast Transmission Corporation Project, MexUs Interstate Pipeline Project, APEX Pipeline Project, and the Integrated Intrastate System Alternative.

System alternatives that were found to meet these criteria, and which were analyzed in greater detail in the EIS, included the following projects: Mojave Pipeline Project, Kern River Pipeline Project, the Joint Mojave-Kern River Pipeline Project, and the WyCal I and II Projects. In view of the Final EIS's conclusion regarding the environmental acceptability of the PGT/PG&E Expansion Project, as modified by the environmental mitigation measures, the Commission concurs with the FEIS's determination that none of the system alternatives (including the original proposal by PGT) would be preferable to the project recommended in the Final EIS now before us.

Although it was administratively efficient to evaluate both the Altamont and PGT/PG&E projects in a single environmental document, the two are not competitive with one another, and therefore were not evaluated as systems alternatives to one another. As we stated in our Preliminary Determinations on Nonenvironmental Issues,[26] Altamont has not established that PGT and Altamont would serve the same market, and PGT has explicitly stated that it does not propose to serve the EOR market which would be served by both Altamont and Kern River.

4. *Pipeline Alignment Alternatives*

Alternative pipeline alignments were identified and evaluated in the EIS where construction of either project would result in residual significant impacts on environmental

---

[26] *See Pacific Gas Transmission Company,* 54 FERC ¶ 61,035 (1991); *Altamont Gas Transmission Company,* 54 FERC ¶ 61,028 (1991).

resources, even after the implementation of conventional mitigation measures, and where reasonable alternative route alignments were available. Environmental resources which necessitated the development and evaluation of alternative route alignments included geology, water resources, wetlands, wildlife, fisheries, cultural resources, and visual resources. The Draft EIS actively solicited comments and suggestions regarding the need for, and the environmental impacts associated with the construction of, these alternative route alignments. All comments received were considered and assessed by the staff in the Comments/Responses Volume of the Final EIS.

As a result of our the analysis conducted in the Draft and Final EIS, several route variations or alternative alignments to PGT's proposed route were considered and ultimately rejected in the Final EIS because they were determined to be infeasible for economic or technical reasons, or because they lacked environmental advantage over other alignments. These include the following three PGT variations: the Camp Nine Alternative, the Hannafin Canyon Alternative, and the John Day Canyon Existing Alignment.

a. *Camp Nine Alternative*

The Draft EIS identified two areas along PGT's proposed route where environmental impacts were potentially significant. The staff concluded that significant impacts at these locations may not be mitigable to less-than- significant levels, and recommended that PGT evaluate the use of alternative route alignments at these locations. The first location where the Draft EIS concluded that the use of an alternative route may be desirable due to significant residual environmental impacts was the Moyie River Valley in Idaho. PGT's route would cross the Moyie River at eight locations, all of which would occur within a continuous fourteen-mile-long area. These numerous crossings increase the likelihood that significant individual and cumulative impacts would occur on water quality and coldwater fish populations. In addition, construction along PGT's proposed route through the Moyie River Valley would also result in

adverse, although not necessarily significant, impacts on sensitive wildlife species, wetland areas, visual resources, cultural resources, and recreational uses.

In order to minimize these impacts, the Draft EIS developed (in conjunction with PGT and the Forest Service) a preliminary alternative route that would eliminate six crossings of the Moyie River. This alternative route, known as the Camp Nine Alternative, would deviate from PGT's route on the downstream side of Compressor Station No. 3, and would rejoin PGT's proposed route on the north side of U.S.2.

The Draft EIS acknowledged a lack of sufficient information to conclusively establish that the Camp Nine Alternative was environmentally superior to PGT's proposed route. Therefore, the Draft EIS recommended that PGT conduct a detailed environmental, engineering, and economic analysis for this alternative route, and submit this information for inclusion and analysis in the Final EIS.

In addition, our staff specifically requested comments on the feasibility and environmental impacts associated with construction of this alternative route from the appropriate federal land management agencies, state natural resource management agencies, and all interested individuals. Finally, the Draft EIS recommended that PGT provide a detailed, site-specific construction, mitigation, and restoration plan for its proposed route for inclusion and analysis in the Final EIS.

The Camp Nine Alternative is approximately 24.8 miles long, and is approximately 6.8 miles longer than PGT's proposed route through the Moyie River Valley. The entire length of this alternative would require new right-of- way, which would result in a five-fold increase in the amount of forest vegetation cleared during construction. In addition, this alternative would cross eight more streams than the segment of PGT's proposed route that it would replace. Several of these additional streams provide critical spawning habitat for sensitive coldwater fish species. Construction along the Camp Nine Alternative route also would disturb areas of traditional use and importance to

the Kootenai Tribe, and could result in additional significant cultural resource impacts. Finally, the incremental cost of constructing along this alternative route is approximately $9 million.

PGT provided a detailed, site-specific construction, mitigation, and restoration plan for its proposed crossings of the Moyie River. This plan, entitled "Moyie River Pipeline Crossings: Construction, Mitigation, and Restoration Plan," was attached to the Final EIS as Appendix F-1. PGT's proposed Moyie River Plan contains detailed information concerning the environmental characteristics of each of its proposed crossings of the Moyie River. In addition, PGT's Moyie River Plan also contains specific construction, mitigation, and restoration procedures for its proposed Moyie River crossings, many of which were developed after extensive coordination and consultation with the Commission staff, the Forest Service, and the appropriate Idaho water quality and fishery management agencies.

Numerous comment letters were received concerning the potential use of the Camp Nine Alternative. These comments included letters from the Forest Service, several Idaho natural resource management agencies, and numerous concerned citizens. With the exception of one private individual, all of these commentors were opposed to the use of the Camp Nine Alternative. The major point of opposition raised by these commentors was that the Camp Nine Alternative would create a new right-of-way through a previously undisturbed area, which would likely result in a greater amount of significant impact than would construction utilizing PGT's proposed route.

Many of these comment letters also referenced PGT's Moyie River Plan, and voiced support for the procedures it contained. Of particular interest to most of these commentors was Appendix B of the Moyie River Plan, which contains a Fishery Enhancement Conceptual Plan. The FEIS concludes, as do most of the commentors on this subject (including the Forest Service and appropriate Idaho agencies), that implementation of PGT's fishery enhancement conceptual plan would result in

significant environmental benefits to the water quality and fish populations of the Moyie River. The Commission concurs with this conclusion.

Construction of the PGT expansion using the Camp Nine Alternative would result in additional environmental impacts as compared to construction along PGT's proposed route. Some of these impacts may be potentially long-term and significant in nature. In contrast, analysis of environmental impacts associated with construction along PGT's proposed route indicates that while these impacts may also be significant, they are primarily of a short-term and temporary nature. In addition, implementation of PGT's proposed Moyie River Plan would provide long-term significant environmental benefits to the water quality and fish populations of the Moyie River.

In sum, construction along the Camp Nine Alternative would result in potentially long-term significant impacts along a new right-of-way, as opposed to the short-term significant impacts and long-term significant benefits that would result from construction along PGT's existing, previously disturbed right-of-way. Further, the proposed route involves the looping of an existing pipeline. As a result, the Camp Nine Alternative does not offer a clear and substantial reduction of environmental impacts when compared to PGT's proposed route. As discussed above, the Camp Nine Alternative not only fails to reduce environmental impacts, but may actually increase both the extent and magnitude of these impacts. Therefore, we conclude that construction along PGT's proposed route, with the implementation of the environmental conditions contained in Appendix C, which include PGT's proposed Moyie River Plan, is the environmentally preferable alternative. In its comments filed in response to the Final EIS, EPA also concurred with this conclusion.

b. *Hannafin Canyon Alternative*

The second location where the Draft EIS concluded that the use of an alternate route may be justified occurs where the John Day Variation would cross extremely steep and rough

terrain in the vicinity of Hannafin Canyon. Construction across the steep slopes of Hannafin Canyon raises concern for the potential of significant adverse environmental impact to occur, primarily due to the probability for landslide activity and slope instability to threaten the integrity of the pipeline. In addition, construction across these extremely steep slopes increases the probability that adverse residual visual impacts and restoration difficulties will occur.

In order to eliminate these potentially significant impacts, the Draft EIS developed an alternative route that would be located on level terrain and would avoid the steep slopes present in Hannafin Canyon. This alternative route would deviate from the John Day Variation at a location where the pipeline is located on relatively level ground on McInnes Norton Ridge, and would rejoin PGT's existing right-of-way on the upstream side of Compressor Station No. 10.

In the Draft EIS acknowledged that it did not have sufficient information to conclusively establish that the Hannafin Canyon Alternative was environmentally superior to PGT's proposed route. Therefore, the Draft EIS recommended that PGT conduct a detailed environmental, engineering, and economic analysis for this alternative route, and submit this information for inclusion and analysis in the Final EIS.

In addition, the Draft EIS specifically requested comments on the feasibility and environmental impacts associated with construction of this alternative route from the appropriate federal land management agencies, state natural resource management agencies, and all interested individuals. Finally, the Draft EIS also recommended that PGT provide a detailed, site-specific construction, mitigation, and restoration plan for its proposed route at this location for inclusion and analysis in the Final EIS.

The Hannafin Canyon Alternative is approximately 4.6 miles longer than PGT's proposed John Day Variation route, and would result in the incremental disturbance of approximately 55.8 acres of land. Construction along the Hannafin

Canyon Alternative route also would result in over a fivefold increase in the amount of agricultural land disturbed during construction. The incremental cost associated with constructing along this alternative route is approximately $6.4 million.

PGT provided a construction, mitigation, and restoration plan for its proposed John Day Variation. This plan, entitled "Construction and Restoration Plan: John Day Variation," was included as Attachment B to PGT's comments on the Draft EIS, and was published in the Final EIS's Comments and Responses Volume. The John Day Variation Plan, as well as PGT's comments on the Draft EIS, stress that PGT's field evaluation of the John Day Variation route indicates that landslide and slope-stability related problems associated with its crossing of Hannafin Canyon are not significant.

We agree with PGT's evaluation of potential landslide and slope- stability problems and with PGT's conclusion that its construction and restoration procedures would ensure that these impacts are less-than- significant. However, we also believe that while the John Day Variation Plan conceptually addresses restoration, revegetation, and visual impacts that are potentially significant, PGT's Plan does not address these issues in a sufficiently detailed and site-specific manner.

Only a few comment letters were received concerning the potential use of the Hannafin Canyon Alternative. Several of these letters were written by the private individual land-owners that would be crossed by both the Hannafin Canyon Alternative route and the segment of the John Day Variation that it would replace. All of these commentors were opposed to the use of the Hannafin Canyon Alternative, and favored the use of the John Day Variation.

The major point of opposition raised by these commentors was that construction along the Hannafin Canyon Alternative would significantly increase disturbance to agricultural land. The Commission agrees. Based on the information presented by the commentors and PGT, and on the staff's analysis, we conclude that these impacts may be long-term in nature.

The FEIS concluded that construction along the Hannafin Canyon Alternative would result in similar levels of impact to most environmental resources as compared to PGT's proposed route, and would substantially increase the extent and magnitude of impact on agricultural land. In addition, we note that the private landowners who would be affected by both the proposed route and the Hannafin Canyon Alternative favor the use of PGT's proposed route. As discussed above, the FEIS has concluded that landslide and slope-stability impacts associated with construction across Hannafin Canyon can be mitigated to less- than-significant levels. In addition, the FEIS also noted that PGT's John Day Variation was developed, after intensive consultation with the BLM and the State of Oregon, as a means to minimize environmental impacts associated with traversing the John Day area.

In view of the above, the Commission concludes that the Hannafin Canyon Alternative does not offer a clear and substantial reduction of environmental impacts, when compared to the applicant's proposed route. Therefore, we conclude that PGT's proposed route, with the implementation of the environmental conditions set forth in Appendix C, is the environmentally preferable alternative. In its comments filed in response to the Final EIS, EPA also concurred with this conclusion.

c. *John Day River Canyon Existing Alignment*

Mr. Arthur J. Scott, a private landowner along PGT's route, filed comments in response to the FEIS, which requested the Commission reexamine PGT's decision to utilize its proposed John Day Canyon Variation route instead of its existing alignment in the John Day Canyon area. Although this issue was discussed in the FEIS, the Commission will reexamine the issue below.

With this variation, the proposed pipeline would not deviate from the existing pipeline at MP 350.8 but would be constructed adjacent to the existing pipeline within the John Day Canyon area. This alternative was rejected in the Final EIS on the Alaska Natural Gas Transportation Project (ANGTS)

because it would have greater environmental impacts than the proposed route, due to the fact that the existing route is located within the floodplain of Thirtymile Creek. In its application and environmental report for the proposed project, PGT indicated that past flooding had threatened the security of the existing pipeline, and therefore the proposed pipeline should not be built in the same area. However, various commentors requested that PGT reanalyze the use of the existing pipeline alignment in the John Day Canyon area.

PGT's existing 36-inch-diameter pipeline was constructed through Thirtymile Canyon and Pine Hollow in 1961. During the winter of 1964-65, extreme winter storms in the Pacific Northwest resulted in dramatic flooding in Pine Hollow, with water levels up to six feet deep from wall to wall of the canyon. This flooding exposed a 295-foot-long section of the existing pipeline in Thirtymile Canyon, and eight sections of the existing pipeline ranging in length from 100 feet to nearly 1000 feet long in Pine Hollow.

Although the pipeline remained operational during this time span, it took PGT nearly an entire summer and one-half million dollars to put the pipeline back in place. During this remedial work, extensive sections of the pipeline were concrete-coated in an attempt to preclude future flotation problems. Despite these efforts, however, additional flooding in January of 1966 resulted in the exposure of six sections of pipeline in Pine Hollow, including three sections which had been previously concrete-coated.

In light of these problems, PGT began to investigate alternative routes through the John Day Canyon area in 1967. The result of this effort was the development, after extensive consultation with the BLM, Oregon Game Commission, and Oregon Department of Environmental Quality, of the John Day variation.

We have independently reviewed the information provided by PGT concerning the problems it has encountered with its existing pipeline alignment through Thirtymile Canyon and

Pine Hollow, and have made two visits to the area to ascertain actual site conditions. PGT's existing alignment is located on the floor of both Pine Hollow and Thirtymile Canyon, which has resulted in the crossing of approximately 4.5 miles of wetland and riparian habitat. The wetland and riparian vegetation in this area serve as important winter range for mule deer, and this area is also extensively used by California bighorn sheep. In addition, Long Hollow Creek, which flows through Pine Hollow, is important spawning and rearing habitat for steelhead trout.

In light of the information presented above, we have concluded that construction of PGT's proposed pipeline through the John Day Canyon area following its existing alignment is not feasible from either an engineering or an environmental perspective. Therefore, we have eliminated PGT's existing alignment from further consideration in the EIS. We concur with the FEIS's determination.

5. *Cumulative Impacts*

The EIS addresses potential cumulative impacts, which result when impact associated with a proposed project is superimposed or added to impact associated with past, present, or reasonably foreseeable future projects within the area affected by the proposed project. Although the individual impacts of the separate projects might be minor, the additive affects from all the projects could be significant.

The PGT expansion would cross a total of 16 counties in Idaho, Washington, and Oregon. In addition, the PG&E intrastate facilities would cross 15 counties in California. A variety of ongoing activities such as timber harvesting, agriculture, urban development, ranching, utility projects, and mining could contribute to potentially significant cumulative impacts. However, we determined that quantifying impact associated with ongoing activities in general was beyond the scope of the EIS analysis, and drawing conclusions about cumulative impact resulting from the proposed project and these activities would be purely speculative.

The Final EIS indicated that it was not aware of any other specific projects that were currently under construction or planned for construction in the reasonably foreseeable future in the project area which could result in significant cumulative impact on environmental resources. However, the FEIS's analysis enabled us to make some general comments regarding the proposed project.

Construction of a pipeline adjacent to and/or within an existing utility corridor in forested areas, which is the case here, would result in additive impacts to vegetation, wildlife, and visual resources. Where multiple rights- of-way are adjacent to one another, the increased width of the cleared corridor would (1) create a larger gap in the protective cover for large animals, (2) increase forest diversity and provide additional habitat for some species of wildlife, and (3) cause the corridor to be more visibly noticeable. In general, since the clearing of previously undisturbed forestland would primarily consist of temporary rights-of-way that would be allowed to revegetate to a forested condition, we do not believe that there would be a significant cumulative impact on these resources.

However, we identified that one area along the PGT Project where significant cumulative impacts may occur is the Moyie River Valley (MP 0.0-20.9). Cumulative impact in this area would be of an additive nature due to PGT's eight crossings of the Moyie River, and would primarily affect water quality and fisheries. However, The FEIS determined that implementation of PGT's proposed Moyie River Pipeline Crossings Plan, which is published as Appendix F to the Final EIS and is included in the environmental conditions attached to this order, would reduce these potential impacts to acceptable levels. In addition, implementation of PGT's proposed plan in this area would provide a long-term benefit to the area because both fish habitat and water quality would be improved as the result of the installation of PGT's proposed fishery enhancement structures.

One specific wildlife concern is the potential for cumulative impact to occur on the resident bald eagle population present at Lake Britton, due to the increased size of the existing utility corridor. The FEIS determined that construction of the PG&E portion of the PGT/PG&E Project would affect, but would not jeopardize, the bald eagle population at Lake Britton. In accordance with section 7 of the ESA, our staff has entered into formal consultation with the U.S. Fish and Wildlife Service concerning this issue.

The PGT expansion would cross the John Day River near an existing AT&T fiber- optic cable right-of-way. The cumulative visual impact of two cleared strips on the canyon wall visible from the river may be significant; however, we believe that implementation of the environmental conditions would make this impact temporary.

The PGT project would require additional compression at three existing station sites, and PG&E would construct compression at two compressor station sites. In both instances, this would result in increased impact to local air and noise quality. However, in neither instance would these additions result in locally significant cumulative effects.

The EPA charges that the Final EIS does not reflect an appropriate analysis of cumulative impacts. The EPA suggests that the analysis should have discussed how the Commission would ensure coordination of management activities between the applicant and managers of adjacent federal lands, particularly with respect to monitoring and mitigation for wetland impacts, and for other resource areas.

The Commission's review of the recommended mitigation measures contained in Appendix C indicates that coordination of management activities between PGT and the appropriate federal land management agency is fully recognized and incorporated into the certificate issued to PGT. For example, condition number 5 requires that PGT develop site-specific revegetation plans for all riparian areas in conjunction with the

appropriate federal land managing agencies. Similarly, condition number 13 requires that the aboveground facility visual protection plan be submitted to the appropriate federal land management agency for review and approval. Finally, condition number 18 requires PGT to consult with the appropriate federal land managing agencies to determine criteria and recommendations for construction, restoration and maintenance within federally administered property, and to implement such where the criteria and recommendations differ from that established in the EIS. The Commission believes that these measures will be more than sufficient to assure coordinated management activities between the project applicant and the adjacent federal land management agencies, so that adverse cumulative impacts would be avoided or effectively mitigated.

6. *Cumulative Economic Impacts*

The operation of the PGT/PG&E expansion may result in growth-inducing impacts. Growth-inducing impacts are those impacts associated with a proposed project that could foster economic or population growth either directly or indirectly, in the surrounding environment. Substantial economic growth may occur as a result of the production and use of natural gas that would be provided by the PGT/PG&E expansion.

Increased exploration and/or development could also occur in Canada as a result of the improved access to Canadian markets that would be provided by the PGT expansion. The amount of economic and population growth in the Canadian gas producing regions attributable to the PGT expansion would depend on the extent of existing production facilities and transportation capacity, as well as the diversity of the local economies.

In areas where gas production and/or gathering facilities are absent or inadequate, secondary impacts could result from the construction and operation of drilling rigs, wellhead equipment, gathering pipelines, treatment plants, field compression units, access roads, and other ancillary facilities. However, at this stage in the proposed project, it is simply too early to

describe either the extent of any impacts associated with the construction and operation of those facilities, or their specific location. The future actions of a great number of entities (EOR and/or non-EOR operators, gas suppliers, gas distributors, federal and state regulators, gas brokers, etc.) will play the major part in making those determinations. Although the precise impacts cannot be analyzed until the extent, nature, and location of any new facilities are known, we conclude that the environmental conditions attached to this order will adequately mitigate significant impacts to the areas where such facilities would ultimately be built.

The increase in the amount of natural gas delivered to California by the PGT expansion may be a significant contributing factor in stimulating economic and population growth. Other factors that contribute to growth include the construction of roads and other transportation facilities, and the expansion of public services, such as sewer and water lines. Socioeconomic impacts that result from increased growth can be either positive or negative. For example, population growth may have a negative effect on water quality, biological resources, and air quality in the area where the growth occurs; however, increased use of natural gas for energy generation, as opposed to other hydrocarbon fuels, would result in an improvement in air quality. Like the analysis of increased gas production, the determination as to the location and magnitude of any environmental or socioeconomic impacts resulting from the increased gas deliveries to California is premature and speculative.

7. *Construction and Operation Impacts*

The Final EIS evaluated the environmental impact associated with the construction and operation of the PGT/PG&E Expansion Project. This information is presented and summarized, by individual resource category, in the following paragraphs. Where appropriate, potentially significant impacts have been identified. In addition, due to the close interrelationship between PGT and PG&E, information concerning the environmental impact associated with the construction of PG&E's

nonjurisdictional facilities, which was obtained from the CPUC's Final EIR, is presented below as well.

a. *Geology*

Geology-related impacts with the greatest potential to adversely affect PGT's facilities include potentially active faults, areas with a high liquefaction potential, and potential landslide areas. PGT's route would cross two potentially active surface faults, approximately 40.4 miles of soils with a high liquefaction potential, and 12.2 miles of slopes that are considered to be potential landslide areas. PG&E's facilities would cross two potentially active surface faults, approximately 46.2 miles of soils with a high liquefaction potential, and 3.5 miles of slopes that exhibit landslide potential. With the exception of potential landslide and slope stability concerns associated with the route of the John Day Variation, geologic hazards are not expected to significantly impact pipeline construction or operation as pipeline design and installation criteria would adequately mitigate potential hazards.

b. *Soils*

Adverse soil-related impacts that could occur along PGT's route include the disturbance or conversion of prime farmland to nonagricultural uses and the disturbance of soils with a poor or poor-to-fair rehabilitation potential. PGT's facilities would cross approximately 138.7 miles of prime farmland and 278.3 miles of soils with a poor or poor-to-fair rehabilitation potential. PG&E's facilities would traverse approximately 166.1 miles of prime farmland and 34.5 miles of soil with poor or poor-to-fair rehabilitation potential. PGT and PG&E would not locate any aboveground facilities on prime farmland.

Implementation of the environmental conditions, specifically PGT's proposed mitigation measures and the "FEIS' Erosion Control, Revegetation, and Maintenance Plan" contained in Appendix C to this order, will ensure that vegetation will be reestablished on all areas disturbed by construction, and that impacts associated with wind and water erosion, soil structure

damage, soil compaction, and drainage alterations will be minimized. Nevertheless, adequate revegetation on some portions of PGT's route may take several years to become reestablished, due to historically low precipitation rates in some regions.

c. *Water Resources*

Construction across perennial waterbodies, intermittent waterbodies, major rivers, and waterbodies with contaminated sediments have the greatest potential to result in adverse hydrologic- and water quality-related environmental impacts. PGT's route crosses 33 perennial and 110 intermittent streams, will require 13 major river crossings, and will cross one waterbody at a location that is known to contain contaminated sediments. In addition, PG&E's facilities will cross 37 perennial streams, 95 intermittent streams, require four major river crossings, and cross two waterbodies that are known to contain contaminated sediments.

The potential impact on these waterbodies includes increased turbidity, sedimentation, decreased dissolved oxygen concentrations, releases of chemical and nutrient pollutants from sediments, and introduction of chemical contaminants, such as fuels and lubricants. However, the majority of these impacts will be eliminated, or reduced to less-than-significant levels, by the implementation of the FEIS' "Erosion Control, Revegetation, and Maintenance Plan" and the "Stream and Wetland Construction and Mitigation Procedures."[27] Further, where the potential exists for residual significant impacts to occur, the environmental conditions require additional mitigation measures to be implemented. However, even with the implementation of these mitigation measures it is likely that some level of increased sediment loading will continue for a short period of time after construction is complete.

The EPA questions the eligibility of the proposed stream and wetland crossings for authorization under a Nationwide Permit, and suggests that the Commission, PGT, and the U.S.

---

[27] *See* Appendix C to this order.

Army Corps of Engineers (Corps) should coordinate with the EPA to determine an appropriate permitting approach. The EPA also charges that the Final EIS fails to evaluate system alternatives in order to define a "least damaging practicable alternative" for the proposed system. In addition, EPA found the responses of our staff to EPA comments submitted on the Draft EIS concerning potential impacts to waters of the U.S. and section 404 requirements to be inadequate.

The discharge of dredged or fill material associated with construction of PGT's facilities across streams and wetlands is regulated under section 404 of the Clean Water Act.[28] This section prohibits the discharge of any dredged or fill material into the waters of the United States without a permit from the Army Corps of Engineers (Corps). Section 404 authorizes numerous activities which the Corps has determined to be similar in nature and which result in minor individual and cumulative impacts by way of Nationwide Permits. Dredge and fill activities associated with pipeline construction are typically authorized by Nationwide Permits unless the Corps exercises its discretionary authority and decides to issue an individual section 404 permit. Individual permits are reserved for activities which are more substantive or pose a greater potential for significant environmental impact. Activities covered by a Nationwide Permit, such as the stream and wetland crossings proposed by PGT along any of the route alignments reviewed in the EIS, have been determined by the Corps to be in compliance with the U.S. Environmental Protection Agency's (EPA) section 404(b)(1) dredge and fill guidelines.[29] If the Corps determines that a particular activity requires an individual section 404 permit, only then must it consider the requirements presented in the section 404(b)(1) guidelines, including the

[28] Clean Water Act, 33 U.S.C. § 1344.

[29] The EPA guidelines can be found at 40 C.F.R. § 230.

requirement that the "least environmentally damaging practicable alternative" be selected.[30] The term "practicable" is defined as "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[31]

As stated in the EIS, PGT will construct its stream-crossings under the authority of the Nationwide Permit. The Corps has not exercised discretionary authority, nor has it informed the Commission that it will require an individual section 404 permit for the proposed PGT/PG&E Expansion Project. Given these facts and the numerous consultations between the Corps and our staff, the Commission finds that an "appropriate permitting approach" for PGT's stream and wetland crossings has already been established and is being implemented. Based on the analysis presented in the Final EIS, the Commission rejects EPA's contention that the magnitude of cumulative impact to wetlands renders the PGT project ineligible for a Nationwide Permit approach.

The EIS considered a number of system alternatives to the PGT Project, using an interdisciplinary approach as required by the Council on Environmental Quality regulations implementing NEPA. In view of the conclusions presented in the Final EIS regarding the acceptability of the PGT Project, the Commission feels that none of the system alternatives, including PGT's filed proposal, is preferable to the project developed in the Final EIS. In addition, the EIS identified and evaluated several alternative alignments (*e.g.*, Camp Nine Alternative, Hannafin Canyon Alternative, John Day Variation), which in part were developed in order to minimize or eliminate impacts on waters of the U.S.

---

[30] *See* Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act section 404(b)(1) Guidelines, 55 Fed. Reg. 9210 (Feb. 6, 1990).

[31] *See* 40 C.F.R. § 230.3(q).

In conjunction with other recommendations in the EIS (notably the "Stream and Wetland Construction and Mitigation Procedures"), the Commission is satisfied that sufficient measures have been and will be taken to avoid impacts to the maximum extent possible. The Commission believes that the NEPA analysis, which the Final EIS represents, is a satisfactory vehicle for defining a "least damaging practicable alternative." The Commission has reviewed EPA's comments, both on the Draft EIS and the Final EIS, and find that while the responses presented by our staff as part of the Final EIS are in some instances brief, they are none the less accurate and the Commission concurs with their conclusion.

EPA further asserts that the "Stream and Wetland Construction and Mitigation Procedures" presented in Appendix C-3 of the Final EIS do not ensure that the proposed project would avoid impacts to the maximum extent possible. As stated above, the Commission has reviewed these Procedures and is satisfied that they constitute "best management practices" which will minimize or eliminate impact on stream and wetland ecosystems to the maximum extent practicable. Therefore, the Commission concurs with our staff's analysis of stream and wetland impacts, as contained in both the Draft and Final EIS, and disagrees with the EPA's contention.

EPA also recommends that PGT commit to developing a "Spill Prevention, Containment and Control Plan" as soon as possible so that it might be reviewed by appropriate agencies prior to issuance of this order. Because of EPA's concerns, the Commission has revised environmental condition number 7, which requires PGT to develop and file a project-specific "Spill Prevention, Containment and Control Plan" prior to construction, to include the requirement that this Plan be developed in consultation with the appropriate federal and state agencies.

Finally, the EPA also cited three mitigation measures which it recommended the Commission include in the PGT certificate to provide an appropriate level of protection to the Spokane-Rathdrum Prairie Aquifer. The Commission notes

that at least one of these actions will occur as a result of the environmental conditions which are attached to the PGT certificate. Specifically, environmental condition numbers 4 and 5 require that PGT implement the "Stream and Wetland Construction and Mitigation Procedures" contained in Appendix C-3 of the EIS. These procedures require, among other things, that hazardous materials, fuels, and other chemicals be stored outside of any "municipal watershed area." In order to determine the limits and extent of all such areas, it will be necessary for PGT to contact state and local water resource and environmental health officers. The Commission also notes that issuance of this certificate does not obviate the need for PGT to comply with all state and local aquifer protection requirements, so inclusion of such a condition would be superfluous. State implementation of the Safe Drinking Water Act requirements will identify the necessary distance which PGT must maintain between refueling or major vehicle maintenance activities and any public water supply well. The Commission is therefore declining to adopt these recommendations.

d. *Land Use*

The primary adverse land use-related impact present along PGT's route involves the presence of construction activities within 50 feet of one or more residential structures. Additional land use concerns include construction across federal or state owned or managed property; potential conflict between the project and existing or planned land use designations, or government land management plans, policies, and regulations; amount of land temporarily disturbed during construction; and the disturbance of agricultural cropland during construction.

Construction activities associated with the PGT expansion will be located within 50 feet of 34 residential structures. In addition, PGT's route will cross 92.4 miles of federal and 4.5 miles of state owned or administered property, and will not conflict with existing or proposed land development or management policies. Finally, PGT's facilities will temporarily disturb 151.3 miles of cropland during construction, and will result in

the total temporary disturbance of approximately 6,673 acres of land. However, implementation of the environmental conditions, particularly the "Erosion Control, Revegetation, and Maintenance Plan", will ensure that impacts associated with the temporary disturbance of land during construction are not significant.

Construction activities associated with PG&E's nonjurisdictional facilities will be located within 50 feet of 90 residential structures. In addition, PG&E's route will cross 49.4 miles of federal and 6.3 miles of state owned or administered property, and will not conflict with existing or proposed land development or management policies. Finally, PG&E's nonjurisdictional facilities will temporarily disturb 173.4 miles of cropland during construction, and will result in the total temporary disturbance of approximately 6,111.7 acres of land.

e. *Vegetation and Wildlife*

Adverse vegetation and wildlife-related impacts associated with the construction of the PGT expansion include impact on wetland and riparian habitat and forested areas; disturbance of federally listed threatened or endangered species or their habitat; and big game, upland bird, and waterfowl habitat that would be significantly affected. Construction of PGT's facilities would require the temporary clearing of approximately 23.5 acres of wetland and riparian habitat, and approximately 1,743 acres of forested land. In addition, PGT's facilities would significantly affect, on a temporary basis, approximately 150 acres of big game habitat, 94.5 acres of upland bird habitat, and 63 acres of waterfowl habitat.

f. *Threatened or Endangered Species*

In its comments, the EPA questions the Final EIS's analysis of potential impacts on federally listed species with regard to several species, and requests that the Commission include in this order a brief discussion of the ongoing section 7 Formal Consultation process. The EPA also requested that the Commission reanalyze potential impacts on federally listed species, and develop new mitigation measures to minimize potential

impact on these species. Although this information was clearly presented in the Final EIS, the Commission will briefly summarize our staff's ongoing section 7 Formal Consultation process, as well as the development of mitigation measures, below.

A biological assessment, as required by the Endangered Species Act, as amended, was prepared to determine whether the proposed project will affect federally listed or proposed threatened or endangered species, or their designated critical habitat. The biological assessment also included potential impacts associated with the construction of PG&E's nonjurisdictional facilities. The biological assessment determined that construction of PGT's facilities will not affect any plant or wildlife species that are federally listed. However, PG&E's facilities will affect three wildlife species that are listed as federal endangered species. Currently, the Commission staff is engaged in formal consultation with U.S. Fish and Wildlife Service concerning these impacts.

In addition, the biological assessment determined that construction of PG&E's nonjurisdictional facilities will affect one federally listed threatened fish species. The Commission staff is currently engaged in formal consultation with the National Marine Fisheries Service concerning these impacts.

Implementation of the environmental conditions attached to this order, particularly environmental condition number 35, will ensure that the requirements of the Endangered Species Act, as amended, are met. In this regard, we note that, among other things, environmental condition number 35 provides that PGT shall not construct its proposed facilities until the formal consultation process and the biological opinions are complete, and PGT develops a Threatened and Endangered Species Mitigation Plan. The Commission finds this approach acceptable, as does the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. This plan must include PG&E's nonjurisdictional facilities as well. In addition, as discussed below, the Commission is requiring PGT to obtain written permission from the Director of the Office of Pipeline and Producer

Regulation prior to commencing construction of the facilities. Implementation of these conditions will ensure that the construction of PGT/PG&E's Expansion Project will not jeopardize the continued existence of any federally listed species.

g. *Fish*

PGT's facilities will cross three waterbodies that support anadromous fish populations, nine waterbodies that provide important spawning habitat for fish, and 14 waterbodies that are considered to be important recreational fisheries. In addition, PG&E's nonjurisdictional facilities will cross 15 waterbodies that support anadromous fish populations, 14 waterbodies that provide important spawning habitat for fish, and 10 waterbodies that are considered to be important recreational fisheries.

Implementation of the Stream and Wetland Construction and Mitigation Procedures will ensure that the majority of wetland-related impacts are temporary and minor, and will prevent the filling or resulting loss of any wetland acreage. Where impacts to important wildlife habitat are significant, the environmental conditions will require PGT to utilize timing constraints in order to reduce these impacts to a less-than-significant level.

h. *Socioeconomic Resources*

Construction of the PGT expansion will not result in significant impact on socioeconomic resources. The influx of workers associated with construction of the project will not result in temporary population increases of 10 percent or more, nor will local vacancy rates for temporary housing decrease below 5 percent. In addition, construction of the PGT Expansion Project will not exceed the ability of local communities and/or county governments to provide essential public services. Finally, the amount of agricultural land and commercial forest land permanently removed from production will not exceed 1 percent of the total amount available.

i. *Air Quality*

PGT proposes to install additional compression facilities at three existing compressor stations. All three of these additions may be significant enough to require Prevention of Significant Deterioration of Air Quality (PSD) review. Compliance with the PSD permitting process, as required by our environmental conditions, will ensure that air quality impacts are reduced to a less-than- significant level.

In its comments, the EPA indicates that although it did not present this information to the staff in its comments on the Draft EIS, it now wishes to clarify information presented in the Final EIS to indicate that both Sandpoint and Coeur D'Alene, Idaho are in nonattainment status for PM-10. The Commission appreciates EPA's efforts in providing this information, and notes that PGT will be required by applicable federal and state law to coordinate with the EPA Region X—Air Programs Branch and the Idaho Air Quality Bureau.

j. *Noise*

The primary noise-related impact associated with the PGT expansion involves the construction of additional compression facilities at existing compressor stations. Compressor station operational noise caused by the construction of additional compression facilities could cause a significant impact at one station on the PGT project route. However, our environmental conditions will ensure that the noise-related impact at this location is minimized.

k. *Transportation and Safety*

The Final EIS concluded that construction of the PGT expansion and PG&E's nonjurisdictional facilities will not result in any adverse impacts on transportation or public safety. The Commission concurs with this conclusion.

l. *Cultural Resources*

Sites that are listed, nominated, or eligible for listing on the *National Register of Historic Places* (NRHP) could potentially be affected by the construction of the PGT expansion. Cultural resource surveys conducted to date by PGT indicate that 155 sites are known to exist within the "area of potential effect" of PGT's facilities, and 68 sites are known to exist within the area of potential effect of PG&E's nonjurisdictional facilities. Our staff is currently working with the respective State Historic Preservation Officers (SHPOs) and the appropriate federal land management agencies to determine which, if any, of these sites are eligible for inclusion on the NRHP.

A plan detailing the next phase of fieldwork, including recommendations of eligibility and possible treatment, was recently prepared by PGT, and in mid-April 1991 was submitted to the Commission, the SHPOs, and appropriate agencies for review and comment. The environmental conditions will ensure that the requirements of the National Historic Preservation Act, and its implementing regulations for compliance with section 106, are met.

EPA expressed concern that incomplete documentation in the Draft EIS would prevent the public from thoroughly evaluating proposed alternatives. Specifically, EPA pointed out that cultural resource sites had not been officially assessed for NRHP eligibility where such were known, and that cultural resource surveys of various routes under consideration had not been completed. EPA feared that other alternative routes, which have not been evaluated under NEPA and its associated review process, could result once this information was available.

The Commission disagrees with the EPA's apparent contention that complete cultural resource documentation must be included in the EIS. The Commission has a longstanding practice of issuing certificates conditioned on the completion of environmental work or on the adherence by the applicants to

environmental conditions. In *California v. FERC*[32] the U.S. Court of Appeals for the D.C. Circuit held that the Commission's deferral of decision on specific environmental mitigation measures "was both eminently reasonable and embraced in the procedures promulgated under NEPA."[33] Further, in *Iroquois Gas Transmission System, L.P.*,[34] the Commission concluded that the rationale of *California v. FERC* was equally applicable to post-certificate mitigation measures under the NHPA.[35] The Commission determined that the issuance of a certificate prior to completion of the cultural resources survey was fully consistent with the NHPA.[36] The Commission determined that its phased approach complied with NEPA so long as the necessary environmental mitigation measures were implemented at some point before the effective date of destructive planning activities.[37]

If post-certificate surveys identify significant resources within the area of potential effect, the Final EIS notes the availability of several mitigating strategies, including site avoidance, data recovery, the use of buffer zones, or boring to avoid or mitigate impact. To the extent that further NEPA documentation is required to implement a particular mitigation measure, this documentation would be prepared. However, the NEPA process should not be held captive until the section 106 compliance process has been concluded.

---

[32] *Public Utilities Commission of California v. FERC*, 900 F.2d 269 (D.C. Cir. 1990).

[33] *Id.* at 283.

[34] *Iroquois Gas Transmission System, L.P.*, 53 FERC ¶ 61,194 (1990), *rehearing*, 54 FERC ¶ 61,103 (1991).

[35] *Iroquois Gas Transmission System, L.P.*, 53 FERC 61,194, at p. 61,764 (1990).

[36] National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*

[37] *Id.* at p. 61,761.

The Commission also notes that the examples of incomplete documentation cited by the EPA are all located in California, where an extensive analysis of these nonjurisdictional facilities and alternative routes was conducted by the California Public Utilities Commission (CPUC). This information was presented in the CPUC's Final Environmental Impact Report (Final EIR), issued in November 1990, and was incorporated by reference into our Final EIS. As such, the Commission feels that the CPUC's analysis of alternative routes was sufficient to satisfy the Commission's NEPA obligations, and notes that the appropriate forum for these EPA comments was before the CPUC.

Since the Commission is conditioning PGT's certificate in a manner consistent with *California v. FERC* and *Iroquois*, the above rationale applies to PGT. Accordingly, the Commission rejects the argument that its EIS is inadequate or that its responsibilities under the NHPA have been neglected. In addition, the Commission notes that while it rejects these arguments, the Commission staff has initiated and circulated, on June 14, 1991, a draft Programmatic Agreement with the Advisory Council on Historic Preservation, the State Historic Preservation Officers of Idaho, Washington, Oregon, and California, BLM, and the Forest Service in order to further enhance protection of cultural resources and ensure *continued* compliance with section 106 of the NHPA. It is expected that a Programmatic Agreement will be adopted by the principals involved in the near future.

m. *Paleontologic Formations*

Construction of the PGT expansion will result in impact to numerous significant paleontologic formations. Based on information presented in the EIS and the CPUC's Final EIR, PGT's facilities will cross or pass in close proximity to approximately 216 miles of formations that contain potentially significant paleontologic resources, while PG&E's nonjurisdictional facilities will cross or pass in close proximity to approximately 324 miles

of formations which contain potentially significant paleontologic resources. The environmental conditions require PGT to develop measures which will protect significant paleontologic resources, where such protection is required by federal law, and where the potential for impact is considered to be high.

n. *Visual Impact*

The PGT expansion will result in approximately 66.2 miles of moderate to high visual impact. The environmental conditions require PGT to implement several mitigation measures at these locations in order to reduce this impact to a less-than-significant level.

o. *Supporting Documentation to Justify Conclusions*

The EPA contends that the FEIS lacks supporting documentation which justify its conclusions regarding no significant impact on various resource areas. The Commission disagrees with the EPA's assertion, and notes that significance criteria for each resource area were presented in the EIS. For example, Chapter 4E states that "substantial portions of local populations" must be affected in order for impacts on federal candidate species to be considered significant. Information on these species, which was presented in Chapter 3E, is then analyzed to determine whether potential impacts would be significant or less than significant. The Commission believes that the analysis undertaken in the DEIS and FEIS was not arbitrary or without basis, and that the information and conclusions presented in the Final EIS are accurate and fully supported.

E. *Written Authorization to Begin Construction Is Required*

Notwithstanding the findings contained in this order, the Commission recognizes that, to date, not all of the environmental plans and mitigation measures have been completed. Accordingly, in order to ensure compliance with all of the environmental and other conditions contained in this order, PGT is not authorized to begin construction of the facilities until the Commission's Director of the Office of Pipeline and Producer Regulation has certified in writing that construction can commence.

2. *NGA Section 3 Authorization and Presidential Permit*

The January 22, 1991 order contemplates the approval of PGT's request for NGA section 3 authorization and a Presidential Permit for the siting, construction, operation, maintenance and connection of the facilities described in the applications filed in Docket No. CP90-1-000, upon satisfactory completion of the environmental analysis. As noted in the January 22, 1991 order, on December 5, 1989, the Commission sent copies of letters to the Secretaries of State and Defense requesting their comments and recommendations on the terms of the draft Presidential Permit.[38] On December 21, 1989 and February 15, 1990, respectively, the designees of the Secretaries of State and Defense responded that they had no objections to the issuance of the permit. Accordingly, the Commission is granting the NGA section 3 authorization and a Presidential Permit, as contemplated by the January 22, 1991 order.

3. *Requests for Rehearing*

A. *Open Season*

a. *Docket No. CP89-460-003*

Among other things, in the January 22, 1991 order we stated that PGT's phased approach[39] to allocating capacity

---

[38] The issuance of a Presidential Permit requires that the views of the Secretaries of State and Defense be solicited before a permit can be issued. See *Yukon Pacific Corporation*, 39 FERC ¶ 61,216, at p. 61,759 (1987). The terms of the draft Presidential Permit are found in Appendix F of the January 22 order.

[39] The phased approach is described as follows (54 FERC at p. 61,153): Basically, in phased I, PGT states that it marketed capacity to utilities only; in phase II, it held an "open season" for the remaining capacity; and in phase III, it redesigned the project to accommodate seasonal service and to create additional capacity which was allotted to PGT's parent company, PG&E. According to PGT, this was done even in the face of remaining requests for service which had not been satisfied and without the requirement that PG&E take part in the bidding process.

unduly discriminated against nonutility shippers. As a remedy to this and other discrimination, we directed PGT to establish new open-season procedures for the initial allocation of the expansion capacity.

Several petitioner proponents[40] of the original open season seek reversal of the Commission's directive in the January 22, 1991 order that PGT establish new open-season procedures to remedy the unduly discriminatory allocation of initial capacity on the expansion project. They generally argue that a second open season should not be held because capacity was awarded initially on a fair basis and according to the "present value methodology," a method which has been accepted as fair by the Commission. No party, they state, who initially requested capacity and who has remained actively interested in securing capacity has been turned away.

In addition, they contend, a new open season would disturb the capacity priority of the innocent shippers who in good faith made financial commitments based on the expansion capacity that they already have been allocated by PGT.[41] Thus, the proponents state, a new open season should only be held for the capacity awarded to PG&E. Finally, the petitioners state, if

---

[40] B.P. Resources, Expansion Shippers, San Diego, PGT, Natgas, Edison, and the Canadian Producers.

[41] For example, BP Resources states that it has already entered into a transportation agreement with Northwest Pipeline Corporation (Northwest) in Docket No. CP91-780-000 so that BP could deliver its gas to PGT's facilities. BP Resources states that its subscription to the Northwest capacity could become worthless if it does not obtain capacity during PGT's second open season. San Diego contends that the discrimination against nonutility shippers could be eliminated by a new open season that did not require shippers to limit their request for capacity, pay reservation fee, or have a contract of 15-30 years. However, San Diego states that previous capacity commitments by PGT to utilities should not be modified.

pipeline sponsors are precluded from obtaining binding commitments before an open season, planning financing, and constructing a pipeline would become significantly more complex and difficult.

Bonus states that while it does not object to the January 22, 1991, preliminary determination in general, it does seek clarification with regard to one aspect of that determination. In particular, states Bonus, before the commencement of PGT's second open season, PG&E downstream services and rates should be clarified. An executed service agreement, it asserts, should not be considered fully binding until these issues are resolved.

BP Resources urges the Commission to cross-condition capacity on the Northwest and PGT expansions in the event that the results of the 1989 open season is allowed to stand. BP Resources contends that its participation in the Northwest open season process was directly tied to its commitment to capacity on the PGT expansion at the Stanfield receipt point. In the process, claims BP Resources, Northwest required the shippers on the proposed Northwest expansion to enter into an unqualified long-term firm service contract. Cross-conditioning is needed, says BP Resources, to relieve BP Resources of the commitment to pay for capacity on Northwest if it does not obtain the same amount of downstream capacity in any rebidding process on the PGT expansion.

We reject the petitioners' arguments. First, while it is true that the "present value methodology" has been accepted as fair by the Commission in previous proceedings, the original open season was not implemented in a fair manner. In particular, all potential shippers did not have an equal opportunity to gain access to *all of PGT's expansion capacity*. By the commencement of the first open season, PGT had selectively awarded most (350 MMcf) of the then-planned expansion capacity to the large utility shippers even though several nonutility shippers had requested capacity. In addition, even after the close of the open season, PGT redesigned the expansion project to accommodate

seasonal service and to create additional capacity which was allotted to PGT's parent company, PG&E.

Second, we agree with the petitioners that a new open season would disturb the capacity rights of innocent shippers who in good faith made financial commitments based on the expansion capacity that they have already been allocated by PGT. However, one fact is clear. Whatever capacity entitlements were held by the innocent open-season winners, such entitlements were the fruit of an unfair open season and were obtained at the expense of potential open- season shippers that did not have the opportunity to bid for all of the expansion capacity. Thus, in order to afford equal capacity rights to all shippers, we directed PGT to conduct a second open season. In this regard, we note that our action here is consistent with past precedent.[42]

Third, we do not find persuasive the argument that no party who initially requested capacity and who has remained actively interested in securing capacity has been turned away. The argument overlooks the possibility that some nonutility shippers, who may have received only a small fraction of the capacity that they originally sought during the open season, were required to sign a precedent agreement with PGT which obligated them to support PGT's filing before all regulatory agencies.[43] Thus, we cannot conclude that silence or inaction on

---

[42] *See, e.g., Wyoming-California Pipeline Company et al.*, 50 FERC ¶ 61,070 (1990), *compliance filing modified and accepted*, 53 FERC ¶ 61,172 (1990) (requiring Wyoming-California Pipeline Company (WyCal) to conduct a second open season after finding that WyCal had unduly discriminated in the allocation of capacity, and not permitting any shippers that had already entered into contracts with WyCal to retain their position on the queue for service).

[43] Several of the precedent agreements, which the expansion shippers were required to sign, provided that "Shipper shall support, participate with and assist Transporters [PGT and PG&E] in their efforts to submit all necessary applications and to obtain the necessary regulatory authorizations for their proposed expansion project . . . " The agreements also provided that "Shipper shall act in a good faith manner and shall take no action inconsistent with its obligations under this Agreement . . .

the part of the expansion shippers means that they are satisfied with the capacity allocation.

Fourth, we will not clarify or rule on the propriety of PG&E downstream services and rates, since PG&E is a Hinshaw pipeline and is regulated by the Public Utilities Commission of the State of California (CPUC).

Finally, BP's request is moot since it now has matching capacity both on PGT and on Northwest Pipeline. We will not cross-condition capacity on the Northwest and PGT expansions to relieve BP Resources of the commitment to pay for capacity on Northwest if it does not obtain the same amount of downstream capacity in any rebid process on the PGT expansion. Such request for relief is in essence a challenge to the propriety of the Northwest open-season procedures and the terms and conditions of the transportation agreement between Northwest and BP Resources, which are more appropriately addressed in Docket No. CP91-780-000.[44]

b. *Docket No. CP89-460-006*

As noted previously, the March 15, 1991 order granted PGT's emergency motion for clarification of the January 22, 1991 order to permit PGT to promptly conduct a new open season for the reallocation of expansion capacity without awaiting the conclusion of the remaining procedures contemplated by the January 22, 1991 order. In addition, the March 15, 1991 order rejected arguments by certain nonutility shippers that the Commission should exempt from the reallocation process the capacity rights of those nonutility shippers who have already entered into agreements for expansion capacity with PGT, and concluded that the amount of expansion capacity that should be

---

[44] We note that in its late motion to intervene filed in Docket No. CP89-460-007, BP Resources also requests that the Commission cross-condition approval of the Northwest expansion project in Docket No. CP91-780-000 on the availability of jurisdictional downstream capacity on PGT for reasons similar to those enunciated in its request for rehearing. We will deny the BP Resources' request to cross-condition for the reason stated above.

allocated in the new open season must include the expansion capacity held by all shippers (including utility and nonutility shippers).

Argument

On April 15, 1991, Edison filed a request for rehearing of the March 15, 1991 order. According to Edison, that order failed to address what will be the effect of participation in the new open season on existing shippers who have rights to the expansion capacity under precedent agreements if the Commission eventually grants rehearing with respect to the original allocation of capacity on the expansion project. Specifically, Edison states that it is unclear whether the Commission intends an existing shipper to choose between (1) retention of its rights and status as an existing shipper, and (2) possible participation as a new open-season shipper on the expansion project.

In any event, Edison contends, the precedent agreement between Edison and PGT/PG&E is a valid contract that cannot be abrogated by the Commission on a whim. According to Edison, modification of that precedent agreement to change the allocation of capacity embodied in that agreement to reflect the results of a new open season can only be justified if the precedent agreement or the allocation embodied in the agreement is found to be unduly discriminatory or otherwise contrary to the public interest.

Response

Because we will deny rehearing with respect to the original allocation of capacity on the expansion project for the reasons stated above, we need not consider whether, if rehearing was granted, the March 15, 1991 order intended an existing shipper to choose between (1) retention of its rights and status as an existing shipper, and (2) possible participation as a new open-season shipper on the expansion project.

Contrary to Edison's second argument, the Commission did not abrogate the precedent agreement between PGT and any other shipper on a whim. Only after finding that PGT had unduly discriminated against nonutility shippers in its initial allocation of capacity, did the Commission prohibit the shippers that had already entered into contractual arrangements with PGT from retaining their position on the queue for service obtained in the initial open season. In this regard, we note that in accordance with the dictates of section 5 of the NGA, once the Commission becomes aware of the existence of undue discrimination regarding any contract, it is obligated to remedy such discrimination even if the remedy interferes with private contractual rights.[45] Accordingly, Edison's request for rehearing in Docket No. CP89-460-006 is denied.

B. *Adequacy of Supply*

Altamont states that PGT has not made an adequate showing of gas supply according to the traditional certificate requirements. Nor, it states, did the January 22, 1991 order find an adequate showing of supply. According to Altamont, the January 22, 1991 order expressed concern that the expansion shippers may not be able to contract for sufficient supplies to support the project and that PGT's precedent agreements contained a provision that effectively prevented a shipper from entering into a firm transportation contract until it has executed its contract(s) for supply and has received regulatory approvals.

---

[45] *See, e.g., Associated Gas Distributors v. FERC,* 824 F.2d 981, 998 (D.C. Cir. 1987), where the Court states that section 5 of the NGA "directs the Commission to adopt corrective measures whenever it finds a "rate, charge or classification,' or any 'rule, regulation, practice or *contract*' affecting the same, to be "unjust, unreasonable, unduly discriminatory or preferential.' " (Emphasis added.) *See also Kern River Transmission Company,* 51 FERC ¶ 61,195, at p. 61,542 (1990) (not permitting the shippers that had already entered into contractual arrangements with pipeline to maintain their present position in the queue for service after finding that the pipeline had unduly discriminated in the initial allocation of capacity).

Altamont states that notwithstanding these inadequacies, the January 22, 1991 order merely imposed "at-risk" conditions. Altamont contends the "at-risk" conditions require PGT to bear the responsibility for any shortfall in cost recovery (1) if the National Energy Board of Canada (NEB) fails to grant export authority of sufficient duration and volumes to allow for the recovery of the costs of the facilities approved; or (2) if the Assistant Secretary of the Office of Fossil Fuel, Department of Energy (DOE/FE) fails to grant import authority of sufficient duration and volumes to allow for the recovery of the costs associated with the facilities and services authorized. Altamont states that these "at-risk" conditions are insufficient to protect consumer interests because the Commission has not justified the use of such conditions as substitutes for the required showing of adequate supplies.[46]

Altamont requests that on rehearing the Commission should establish procedures under which PGT's shippers would be required to show that they have sufficient supplies to support PGT's proposed pipeline project. In that connection, it states, Altamont and other interested parties (1) should be given access to the "confidential" data that PGT and its shippers have submitted to the Commission and (2) should be allowed to conduct discovery with regard to the various shippers' efforts to secure supply. In addition, asserts Altamont, an evidentiary hearing should be held to address the following questions:

— What is the contractual status of the reserves identified by PGT's shippers?

— Can such reserves be accessed by existing pipeline facilities?

— Are such reserves committed to the PGT/PG&E expansion project?

---

[46] The Amoco Group states that the "at-risk" import conditions imposed in the January 22 order are inadequate because the DOE/FE may grant import authority unrelated to reserves or deliverability actually committed to shippers.

— Can necessary regulatory approvals be obtained with regard to such reserves?

The Amoco Group raises arguments similar to those advanced by Altamont. In addition, it contends that adequate gas supply for the expansion project has not been demonstrated because (1) the January 22, 1991 order's assumptions regarding a projected availability of surplus Canadian supplies of almost 1 Tcf per year fails to differentiate between technically available and economically available gas supplies; (2) neither the Commission nor PGT attempted to analyze the correlation between gas prices and gas supplies; and (3) the Commission failed to consider numerous other new and major expansion projects which will compete for available Canadian gas supplies, including Northern Border, Northwest, Altamont, Empire, and Iroquois. The Amoco Group states that the public interest is not served by the certification of an expensive and unnecessary pipeline project which will divert investment funds from other projects, including alternative optional certificate pipeline projects which involve no risk to gas consumers.

We will deny the requests for rehearing and the request for an evidentiary hearing on the adequacy of supply issue. We reject as speculative Altamont's argument that the "at-risk" conditions are insufficient to protect consumer interests because the Commission has not justified the use of such conditions as substitutes for the required showing of adequate supplies. Historically, source and firmness of supply have been important factors in section 7(c) certification. Generally, an applicant has to demonstrate the existence of a long-term supply source prior to receiving Commission authorization to proceed with a project.[47]

As to the issue of long-term supply source, the January 22, 1991 order concluded that there appeared to be sufficient supplies of Canadian gas, given the fact that the "deliverability

---

[47] *Tennessee Gas Pipeline Company*, 52 FERC ¶ 61,257, at p. 61,926 (1990) *(NIPS III)*.

surplus [of Canadian gas] will persist throughout the period to 2020, averaging almost 1 Tcf per year...."

In addition, we note that neither case law, the NGA, nor our regulations require an evaluation of the effect on gas supply by potentially competing pipelines. Even if such an evaluation was required, we are not convinced that approval of the expansion project would substantially drain Canadian reserves to the point of rendering the PGT expansion project as unnecessary and duplicative, given the level of deliverability surplus estimates of Canadian gas noted above and PGT's statement that it does not intend to serve the EOR market in Kern County.

At this juncture, we find it appropriate to make the following observation rendered by DOE/FE in its preliminary import authorization for ANR gas in its Opinion and Order No. 368 issued January 11, 1990:

> Natural gas has been imported from Canada for many years and there have been no instances of major natural gas supply interruption that would call into question Canada's future reliability as a supplier of natural gas to this country.

However, notwithstanding the confidence expressed in the supply of natural gas in Canada, we are still concerned that the majority of PGT's shippers have or have applied for short-term (2-year) blanket import authority. However, only two shippers (IGI and Salmon Resources) have been identified as having long-term import authority of 15 years. In light of the supply arrangements of questionable duration, we cannot make the unconditional finding that there currently exists a totally reliable source of supply for the project. Acknowledging this uncertainty, we will impose the following condition on the certificate authorization:

> PGT shall be required to bear the responsibility for any shortfall in cost recovery if the Canada NEB fails to grant export authority of sufficient duration and volumes to allow for the recovery of the costs of the facilities approved

herein. In that event, the applicants are explicitly prohibited from shifting any of the costs associated with the facilities authorized herein onto any of their other customers. This same provision shall apply to the import authority ultimately granted by DOE/FE to the shippers if that import authority proves to be of shorter duration or a lower volume than necessary for the recovery of costs associated with the facilities and services authorized herein; and ***

C. *Adequacy of Markets*

The January 22, 1991 order found that PGT had demonstrated market need for the expansion project. Specifically, we stated:

> PGT's expansion project is fully subscribed by shippers who have agreed to pay a reservation fee. (Footnote omitted.) At the technical conference, these shippers voiced their support for the project and subsequently provided the Commission with detailed market data which reveals the planned use for the supplies.
>
> In addition, PGT provided market data which reflects that about one-third of the project will be used to satisfy "new" market demand in California and that the remainder of the volumes will be used to displace current supplies on existing pipelines. Consequently, capacity on those existing lines will be "free[d] up," thus providing the market access to presently flowing U.S. supplies. In light of the CPUC's finding that the California market requires an additional 900 MMcf/d of natural gas by 1995, the new supplies on PGT's expansion along with the U.S. supplies available from this "free up" of existing capacity should provide a competitive market environment for domestic and Canadian supplies.

Altamont states that the evidence described above does not demonstrate market need. In the first place, states Altamont, PGT's precedent agreements, which contain the reservation fee that PGT has agreed to pay, no longer have any force or effect. Altamont believes that this is so because the January 22, 1991 order directed that precedent agreements be renegotiated as a remedy to the unduly discriminatory open season. In addition, Altamont asserts that those agreements constitute little more than agreements to negotiate; they do not impose upon the PGT shippers any financial obligation to go forward with the project. Moreover, Altamont contends, even if it could be argued that the precedent agreements have some evidentiary value, the fact that the PGT/PG&E expansion project was fully subscribed does not constitute a sufficient basis for the Commission's conclusion that the expansion project is required by the public convenience and necessity. Rather, contends Altamont, the fact that the project is fully subscribed may indicate that PGT has significant market power with which to extract an agreement unfavorable to its customers.

Second, Altamont contends that the Commission's reliance on the CPUC's findings in Decision 90-02-016 and the 1990 California Gas Report is misplaced. Altamont argues that neither of these reports identified a specific project as being the best way to serve the additional need for natural gas in California. In fact, Altamont asserts that the CPUC has made favorable comments about a number of different proposals, including the Altamont Project. Further, states Altamont, the projections reflected in the CPUC's decision and the 1990 California Gas Report are not sufficiently precise to be relied on in the context of attempting to determine whether a specific pipeline project is in the public interest.

Similarly, claims Altamont, the forecasts reflected in the 1990 California Gas Report do not establish that there is a need for the PGT/PG&E expansion project. For example, it states, the 1990 California Gas Report only shows near term (1990 to 1995) growth of 371,000 Mcf per day for Southern California—the market which the expansion project is purportedly designed

to serve. Moreover, states Altamont, for the period 1990 to 2000, the projected growth for Southern California is only 693,000 Mcf per day, which is less than the design capacity of the expansion project.

Third, Altamont asserts that neither PGT nor its shippers provided the market data required by section 157.14(a)(11) of the regulations.[48] Altamont contends that the market data provided by PGT and its shippers does not support the finding that PGT's project is needed to serve new demand for nonutility shippers.

Finally, Altamont contends that the January 22, 1991 order's finding that the PGT/PG&E expansion project is needed to free up capacity on other pipelines is not supported by the record. For example, states Altamont, PGT has denied that the project was intended to displace existing firm service of other pipelines and insisted that by the year 1996, the expansion will be based 100 percent on incremental growth in the California market.[49] In any event, states Altamont, the January 22, 1991 order's justification is not adequate since that order seems to have (1) accepted the CPUC's short-term projection even though the more current forecast in the 1990 California Gas Report indicates that in the near-term the market in Southern California is only expected to grow by 371,000 Mcf per day, (2) overlooked the fact that the Commission has already issued

---

[48] According to Altamont, that section requires a "system-wide estimate of the volumes of gas to be delivered during each of the first 3 full years of operation of the proposed service, sale, or facilities and during the years when the proposed facilities are under construction and actual data of like import for each of the 3 years preceding the filing of the application." In addition, states Altamont, that section requires the provision of detailed information regarding, among other things, the nature and demand of the customers and municipalities to be served; the total annual and peak-day gas requirements by classification of service; and copies of "each market survey made within the past three years for such markets as are to receive new or increased service from the project applied for."

[49] *Citing* PGT's response to supplemental comments filed on September 11, 1990.

certificates for capacity exceeding the near-term need identified by the CPUC, and (3) failed to weigh the competitive benefits (*e.g.*, diversity of supply) against the additional costs (*e.g.*, duplicate facilities).

For these reasons, states Altamont, the Commission must establish procedures pursuant to which a complete record can be developed as to the market need for the expansion project. At a minimum, it states, these procedures should provide for a hearing at which the following issues can be addressed:

— In light of the fact that existing optional certificate authorizations already exceed market demand projections, is there a need for the expansion project?

— How do the ongoing CPUC gas procurement rulemakings affect market needs (core, noncore), especially for utility customers such as PG&E and San Diego Gas & Electric Company.

— Will pipelines with capacity that is "freed up" by the expansion capacity be able to secure new shippers for that "freed up" capacity? If so, at what rates?

— If the pipelines with "freed up" capacity are able to secure new shippers, what will be the impact on the existing ratepayers served by these pipeline systems?

— If the pipelines with "freed up" capacity are unable to secure new shippers, what will be the impact on the existing ratepayers served by these pipeline systems?

Altamont's arguments are unpersuasive, especially in light of the firm transportation contracts submitted, our discussion about the need for a hearing in this proceeding and our earlier discussion on markets in this order. Altamont's request is therefore denied.

D. *Rates*

1. *Deferral of Rate Issues*

Altamont and Kern River argue that the Commission's deferral of rate issues to PGT's next rate case is erroneous and thus request a full investigation of all aspects of PGT's proposed rates. Altamont objects to the Commission's deferral of PGT's estimate of the construction costs of the project and deferral of the examination of the cost allocation issue to PGT's next section 4 rate case. Altamont contends that the deferral of these issues violates the Commission's clear statutory objective to investigate the type of matters referenced above in deciding whether the PGT/PG&E Expansion Project is required by the public convenience and necessity. In addition, Altamont contends that the Commission's failure to address these matters undercuts its competitive policies. In this regard, it is argued that to enable shippers to make informed choices between competitive alternatives, it is imperative that the market place be provided with accurate rate information. Thus, initial rate levels and rate methods must be established in certificate proceedings and must not be left for future determination in section 4 rate cases.

Finally, Kern River requests clarification as to whether the 95-percent load factor throughput which the January 22, 1991 order authorized to apply to PGT's rates will be a permanent certificate condition. PGT, on the other hand, challenges what it terms the extremely high throughput assumption which, PGT argues, does not correlate with the reduced reservation charge imposed by the certificate order.

As an initial matter, we address Kern River's clarification request. In view of our decision to defer risk allocation and rate issues, we are deferring Kern River's request concerning throughput. Altamont would have the Commission perform a full-blown section 5 investigation, thereby determining just and reasonable rates in a section 7 proceeding. We decline to

exercise that authority. While the NGA requires that the Commission carefully review and set initial rates in a section 7 proceeding,[50] it does not require the Commission to make a determination of just and reasonable rates in such a proceeding. The proper forum for establishing permanent or just and reasonable rates is in a section 4 or section 5 proceeding.

Because the final rule in Docket No. RM90-1-000 will discuss capacity allocation, this issue remains tolled.

Finally, we reject Altamont's suggestion that the Commission's failure to address these matters undercuts its competitive policies. Deferring certain issues to PGT's section 4 rate case will not result in disinformation in the marketplace. All shippers have been placed on an equal footing as a result of our action here, and all involved shippers will be able to make informed choices between competitive alternatives.

2. *Adoption of Modified Fixed Variable Rate Design*

Altamont requests that PGT be required to use a MFV rate design over the enhanced fixed-variable rate design approved by the Commission in the January 22, 1991 order. On this issue, we note that PGT originally requested a straight fixed-variable rate design and that in its tariff sheets filed in the amendment application, it has once again requested a 100-percent demand charge.

In our prior orders in these and Northeast Project dockets, we generally approved or imposed the MFV methodology for the project rates for the reasons stated in those individual orders. We noted, however, that our initial recommendation of the MFV methodology did not constitute any endorsement of any underlying rate methodology, principle or concept. In particular, we emphasized that our decision to require the MFV methodology reflected our conclusion that as an initial matter, it was appropriate to have consistency between the current rate

---

[50] *See Atlantic Refining Co. v. Public Service Commission,* 360 U.S. 378 (1959).

design utilized by the associated pipeline and that authorized for the additional services and facilities, pending subsequent application of the Rate Design Policy Statement, rather than any conclusion that the MFV methodology for some reason should or must apply separately to these additional services and facilities for any extended period of time.

Today, we grant rehearing of that initial determination for the case-specific reasons set forth in this and the Northeast Project orders.[51] At the same time, we also recognize that there continues to be an active debate over whether current policies embody rate methodologies that favor Canadian natural gas imports over domestic supplies. Previously, we have stated that parties should thoroughly examine that issue, on a case-by-case basis, and devise and consider appropriate and effective solutions to ensure that both sales and transportation of Canadian and U.S. domestic gas are treated in a fair and nondiscriminatory manner.[52] At this time, we have concluded that we should address in the Notice of Proposed Rulemaking in Docket No. RM91-11-000,[53] whether particular rate design methodologies, including, but not necessarily limited to, the Fixed Variable or so-called Enhanced Fixed Variable methodologies are necessary to ensure such fair and nondiscriminatory treatment. Thus, our decisions in this and the Northeast dockets to grant rehearing now and allow such alternative rate design methodologies will not stand as an anomaly under current practices, but will be paralleled in short order by the broader review in the forthcoming NOPR.

---

[51] *Texas Eastern Transmission Corp. et al.,* 55 FERC ¶ 61,477 (1991); *CNG Transmission Corporation et al.,* 55 FERC ¶ 61,479 (1991); *Texas Eastern Transmission Corp. et al.,* 55 FERC ¶ 61,482 (1991); *Columbia Gas Transmission Corp. et al.,* 55 FERC ¶ 61,478 (1991); *Tennessee Gas Pipeline Co., et al.,* 55 FERC ¶ 61,483; *ANR Pipeline Company et al.,* 55 FERC ¶ 61,481 (1991) (collectively referred to as "Northeast rehearings").

[52] *Tennessee Gas Pipeline,* 51 FERC ¶ 61,113.

[53] In Re Pipeline Service Obligations: Revisions Regulations Governing Self-Implementing Transportation under Part 284 of the Commission's regulations.

Our decision to grant rehearing to PGT of the rate design issue in this project is based upon our determination that agreements among the pipelines and their customers regarding rate design should be given significant weight and implemented, absent a determination by the Commission that it would be unreasonable to do so, for example, in instances in which the agreement on rate design was not the result of an arm's-length negotiation; or where the pipeline was able to exercise sufficient market power to deprive the customer of a meaningful choice in the matter; or where a 100-percent demand charge rate would give a particular supply source a nonmarket-related, anticompetitive advantage.

There is nothing in the record to suggest that the PGT shippers agreed to the proposed 100-percent demand charge rates for other than legitimate commercial reasons. Finally, while transportation service by PGT to its shippers in this project under a 100-percent demand charge rate could have an impact on those shippers' choice of natural gas supply sources, the Commission has not, in the past, taken action to adjust pipeline rates to attempt to equalize the relative competitive postures of competing Canadian pipelines or gas supply fields.[54]

The Commission's January 22, 1991 order set rates for PGT based in part on a 12.75 percent rate of return on equity and an "Enhanced Fixed-Variable" (EFV) rate design method that assigned approximately half the allowed expenses of equity return and related taxes to the reservation charge and the rest to the usage charge. More recently, the Commission has determined in the Northeast Projects proceedings that a 25-basis-point reduction in rate of return appropriately reflects a shift from the modified fixed-variable (MFV) rate design method to the SFV method. Although the rate design methods being considered here on rehearing do not present the identical situation as in the Northeast Projects dockets, we are providing the following Rate Schedule T-3 transportation rates—based on

---

[54] *See* Opinion Nos. 357 and 357-A, 53 FERC ¶ 61,194, at pp. 61,701-703 (1990) and 54 FERC ¶ 61,103, at pp. 61,357-359 (1991).

a 12.50 percent rate of equity return—for use in our authorization of the straight fixed-variable rate design. We will authorize PGT to charge the following rates:

	Reservation Charge
Kingsgate-Malin	$14.107
Stanfield-Malin	$ 7.718
Kingsgate-Stanfield	$ 6.389
Kingsgate-Bonner's Ferry	$ 0.623
Kingsgate-Schweizer	$ 1.278
Kingsgate-Sandpoint	$ 1.365
Kingsgate-Athol	$ 1.953
Kingsgate-Rathdrum	$ 2.249
Kingsgate-Spokane	$ 2.494
Kingsgate-Mica	$ 2.790
Kingsgate-Spangle	$ 3.091
Kingsgate-Rosalia	$ 3.356
Kingsgate-St. John	$ 3.660
Kingsgate-Lacrosse	$ 4.210
Kingsgate-Madras	$ 9.447
Kingsgate-Prineville	$ 9.831
Kingsgate-Redmond	$10.096
Kingsgate-Bend	$10.469
Kingsgate-Stearns	$10.807
Kingsgate-Gilchrist	$11.539
Kingsgate-Klamath Falls	$13.798

The Preliminary Determination explicitly adopted the negative salvage rate proposed by PGT. In its amendment, PGT proposes rates that are based on the same level of negative salvage expense as underlies the approved Expansion Project rates and which we continue to view as reasonable. However, because the proposed plant cost has increased, the proposed negative salvage rate (which expresses the annual negative salvage expense as a percentage of gross plant) is lowered from 0.042 percent to 0.033 percent. The Commission therefore adopts the 0.033 percent negative salvage rate proposed by PGT in the CP89-460-007 amended application.

3. *Rate Hearing*

In its request for a hearing, Altamont objects to the Commission's assertion in the January 22, 1991 order that the issues of cost allocation and rate design are matters of Commission policy. Altamont argues that although Commission policies are clearly involved, those policies cannot be evaluated in a vacuum. According to Altamont, in determining whether a particular rate design or cost allocation procedure should be approved, it is imperative that the Commission understand how that rate design or cost allocation will impact the marketplace; furthermore, to make such an assessment, it is necessary to have a full and complete record that reflects, among other things, the project's costs, the resulting rates using different proposed methodologies and the proposed rates for the competitor's projects. Altamont argues that such a record does not exist in this proceeding. For these reasons, and due to a number of questions Altamont wants answered in this proceeding, Altamont requests that discovery together with an evidentiary hearing.[55]

We deny Altamont's requests for an evidentiary rate hearing and for discovery. The necessity of either an evidentiary hearing or discovery has not been established to resolve any issues of material fact in this case. Altamont's request in essence appears to be another plea to conduct a section 5 inquiry in this section 7 certificate proceeding. As discussed above, while the NGA requires that the Commission carefully review and set initial rates in a section 7 proceeding,[56] it does not require the Commission to make a determination of just and reasonable rates in such a proceeding. The proper forum for establishing permanent or just and reasonable rates is in a section 4 or section 5 proceeding. Altamont's questions may be raised in PGT's section 4 rate case.

---

[55] Some of the questions Altamont wants answered are: (1) whether PG&E has any need for capacity, (2) whether the project is properly sized, and (3) PGT's requests for a rate design other than MFV.

[56] *See Atlantic Refining Co. v. Public Service Commission,* 360 U.S. 378 (1959).

4. *Rate Discrimination/Hearing*

Pacific Interstate and SoCal contend that the PGT expansion unfairly discriminates in rates against existing customers, such as Pacific Interstate. SoCal and Pacific Interstate believe that the need to resolve these rate effects on existing customers before the construction is evidenced by the fact that PGT in this case is seeking to increase its rates by over 10% and construction cost estimates by $170-million before construction even commences. SoCal and Pacific Interstate contend that the southern California core-market customers served by SoCal will subsidize the PGT expansion for the benefit of southern California noncore, northern California and Pacific Northwest customers as rates are currently designed, and that future rate case relief and "risk-shifting" conditions are ineffective. In essence, the petitioners seek a rate hearing to air these issues.

Pacific Interstate and SoCal have made only vague and unsupported allegations that the southern California core-market customers served by SoCal would subsidize the expansion project. They have failed to explain or demonstrate how this subsidy would occur. Due to the incremental rate we are authorizing, only the expansion customers will bear the costs of the expansion project. Existing customers' rates will not change until and unless PGT in a future rate case seeks to shift some of these costs. We believe our response to Altamont stated above adequately responds to the issues raised by Pacific Interstate and SoCal regarding the need for a rate hearing. Their rehearing requests are rejected.

5. *No Justification of Deferred Depreciation Schedule*

Amoco contends that in the Commission's discussion of PGT's proposal to depreciate expansion facilities over a 30-year period, the Commission failed to address the objections raised to PGT's deferred depreciation schedule during the first five years of the Expansion Project. Amoco argues that the proposed reduction in initial rates is improper because it fails to

match costs and the services being provided to specific expansion shippers. Amoco believes that PGT has attempted to induce expansion shippers to commit to the Expansion Project by offering low initial rates based in part on deferred depreciation costs. Amoco points out, however, that PGT did not require these same initial expansion shippers to commit to firm transportation for a 30-year period. Amoco requests that on rehearing, the Commission disallow this deferred depreciation schedule in PGT's first rate case proceeding unless PGT is able to demonstrate that the same shippers who receive the benefits of the deferred depreciation now are the same shippers who have agreed to long-term transportation contracts.

Amoco's argument is rejected. The deferral depreciation schedule referred to by Amoco was rejected in the January 22, 1991 order when the settlement itself was rejected. There is simply no basis to entertain this line of argument.

6. *The Record Does Not Support Using the Same or Similar Rate Designs for Existing and Expansion Customers.*

Amoco objects to the rate design approved in the January 22, 1991 order.

In view of the decision in this order changing PGT's rate design to straight fixed-variable, we find the issues raised by Amoco to be moot.

7. *Cost Allocation*

Amoco contends that the January 22, 1991 order fails to explain why PGT's initial firm rates are designed based on incremental cost allocation but its interruptible rates are designed based on rolled-in cost allocation. Amoco argues that PGT should not be allowed to implement such an unduly discriminatory rate structure on the expansion project.

PGT did not propose—and the Commission did not authorize—initial rates for interruptible transportation service using the Expansion Project facilities. PGT stated in its October 1989

application amendment that it intends to provide open-access interruptible transportation service on its system under one rate schedule for all shippers. That is, such service would be provided at PGT's Part 284 interruptible rates. Contrary to Amoco's claim, there is no undue discrimination inherent in PGT's plan to provide system-wide open-access interruptible transportation pursuant to Part 284 of our regulations using its currently effective ITS-1 rates. The use of existing Part 284 rates for interruptible service on expansion facilities for which incremental rates have been approved for firm service under section 7(c) of the NGA is entirely consistent with the Commission's policy and practice.

8. *Initial Rates and Reservation Charges*

PGT contends that the Commission has undertaken to prescribe "initial rates" for the Expansion Project without giving effect to the construction costs which will be incorporated in the project when it commences services. PGT states that its primary concern with the initial rates is the seeming precision of the calculation of both the monthly reservation charge and the usage charge, with no recognition that the rates themselves would require revision upon commencement of operations to reflect the construction costs actually incurred between 1988 and 1993 when the facilities are scheduled to be placed in operation. PGT contends that in this proceeding, not only has the Commission attempted to calculate initial rates without considering the actual construction costs for the project, but it has also included a restrictive condition in the certificate order that is inappropriate for the rate levels derived. Namely, PGT refers to Ordering Paragraph (K) of the January 22, 1991 order which provides that:

> To the extent that PGT's actual cost of service exceeds the estimated cost of service on which these initial rates are based, PGT shall assume the risk for any undercollection.

To remedy the January 22, 1991's alleged error, PGT requests that the Commission prescribe the reservation fee

percentage of fixed costs, while recognizing that the rates themselves will later reflect the actual construction costs. In this connection, PGT cites the Commission's Opinion and Order No. 357, in *Iroquois Gas Transmission System, L.P. et al.* As interpreted by PGT, in Opinion No. 357 [53 FERC ¶ 61,194] the Commission corrected its preliminary exclusion of cost escalation from Iroquois' rate base, recognizing that the initial cost projections in 1989 dollars should be adjusted to the period in which the project would commence operations. PGT contends that the Commission's solution on rehearing of Opinion No. 357 was to provide for a compliance filing for the construction cost escalation. PGT believes that this procedure could be particularly appropriate in this instance because of other features of the Commission's order which refer to the timing of changes in rates on PGT's system.

As noted above, several months after PGT filed its request for rehearing of our January 22, 1991 order PGT filed an amendment to its application in which it, among other things, presented updated facility costs that it claims have been appropriately escalated from the original 1988 cost level through the period up to the anticipated 1993 in-service date of the facilities. We are today approving that part of the amendment and establishing initial rates that are based on PGT's best estimate of the Expansion Project's capital costs. Further, we are granting PGT's rehearing request as to rate design and have based the initial rates as revised herein upon the straight fixed-variable rate design method. Based upon the foregoing, we find PGT's concerns as to the capital costs underlying its initial rates as well as what portion of those costs is recovered through the reservation charge moot as a result of these actions.

PGT requests clarification as to the effect of Ordering Paragraph (K) of the January 22, 1991 order, which states that PGT must assume the risk of any undercollection if its actual cost of service exceeds the estimated cost of service on which the initial rates are based. We will confirm PGT's understanding that any change in rates will require a filing by PGT.

9. *Rate Level*

PGT also contends that two major components of the rate level should be revised, or at least made subject to pre-operational revision by PGT. PGT believes that both the 95 percent throughput condition and the 12.75 percent return on equity are inequitable in the context of the changes which the Commission required in its order.

In connection with the former, PGT points out that the throughput levels of nonoptional pipelines is well below the 95 percent that has been applied in this proceeding. As example, PGT cites the Iroquois pipeline which was given a throughput level of 87 percent.

Regarding PGT's objections to the authorized return on equity, PGT notes that the higher 14.25 percent return on equity was agreed to by all shippers which signed PGT's precedent agreement for the 903,000 MMcf of capacity.

In view of our decision to grant PGT a straight fixed-variable rate design, the issue of throughput raised above by PGT is now moot.

In recognition that the change to straight fixed-variable rates will theoretically reduce the pipeline's risk by allowing greater recovery of costs through contract demand billing, we will initially make an adjustment of 25 basis points in the 12.75 percent return on equity approved for the pipeline with enhanced fixed-variable rate design. The resulting 12.50 percent return will allow this project to go forward without more detailed examination of the effects of these changes. In PGT's rate case, the parties will be able to examine these issues thoroughly as well as other issues that affect the risks faced by PGT. This will enable the Commission to continue to study this issue generally and consider it as we process pending cases. As the industry gains more experience on these issues, the Commission may consider a revised approach on these issues.[57]

---

[57] *See* Northeast rehearings.

10. *Rate Tilt*

The Producer Associations contend that the PGT expansion will create a rate tilt which provides Canadian gas with an artificial regulatory advantage when competing for the California market. The Producer Associations object to PGT's and PG&E's taking title to gas at the Canadian border. Thus, in essence, the Producer Associations would have the Commission apply Opinion No. 256 [37 FERC ¶ 61,215] remedies to all PGT volumes, regardless of whether PGT transports or sells them.

As noted in Opinion No. 357, and the July 30, 1990, Preliminary determination[58] in Iroquois, while we are sympathetic to the concerns raised by the Producer Associations, the Commission has no direct jurisdiction over the purchase arrangements in Canada between U.S. LDCs and Canadian producers applicable to gas transported over the PGT pipeline. The expansion project involves the certification of pipeline facilities which will be utilized solely for the *transportation* of gas within the United States and, in that context, the transportation of gas owned by third parties. The gas to be transported by the PGT facilities will be supplied directly by the shippers, which are LDCs, marketers and producers.

In *Tennessee Gas Pipeline Company (NIPPS III),*[59] the Commission recently described the legal framework underlying its regulation of rates used to recover the cost of facilities which transport imported gas. Under the Department of Energy Organization Act (DOE Act), authority over imports of natural gas resides, in the first instance, with the Secretary of Energy. Pursuant to Delegation Order No. 0204-111,[60] the Secretary of Energy delegated to the Administrator of the Economic Regulatory Administration (now the DOE/FE),[61] authority under

---

[58] 52 FERC ¶ 61,091 (1990).

[59] *Id.* at pp. 61,922-25.

[60] *FERC Statutes and Regulations* ¶ 9912 (1984).

[61] The authority delegated to the Administrator of the Economic Regulatory Administration now resides with the Office of Fossil Energy of the Department of Energy (DOE/FE).

section 3 of the Natural Gas Act to regulate the importation of natural gas based upon consideration of such matters as he finds in the circumstances of a particular case to be appropriate, including the competitiveness of the import, the need for the natural gas, and the security of supply. Pursuant to the companion Delegation Order No. 0204-112,[62] the Secretary delegated to the Commission, among other things, all functions related to imports under sections 4, 5 and 7 of the Natural Gas Act.

In Opinion No. 256,[63] the Commission construed the authority over imports that the Secretary delegated to it. The Commission determined that pursuant to that delegation it had the responsibility under the Natural Gas Act to ensure that the costs of Canadian and domestic gas supplies are treated the same in the sales rates of domestic pipelines so that there would be no preference for either source of supply. The Commission required that some costs be shifted from the proposed demand charge to the commodity charge to ensure that the costs included in demand charges were comparable in import and domestic arrangements so that Canadian and domestic suppliers had an equal opportunity to compete and that American consumers are treated fairly. The Commission thereby exercised its authority delegated by the Secretary of Energy to ensure that Canadian imports and American supplies are "treated no differently" and the cost recovery provisions "achieve reasonable results."[64]

However, we find it inappropriate for the Commission either to require the restructuring of underlying transactions or require the filing of the underlying contracts and impose Opinion No. 256-type restrictions on them, since these transactions

---

[62] *FERC Statutes and Regulations* ¶ 9913 (1984).

[63] *Natural Gas Pipeline Company of America,* 37 FERC ¶ 61,215 (1986) (Opinion No. 256), *reh'g granted in part,* 39 FERC ¶ 61,218 (1987) (Opinion No. 256-A).

[64] Opinion No. 256 quoted the Economic Regulatory Administration opinion issued in *Natural Gas Pipeline Company of America* (1 ERA ¶ 70,645 (1986)).

and contracts are beyond the jurisdiction of the Commission. The Commission has no authority to modify the sales agreements between the various gas purchase customers and their Canadian suppliers, all of whom are outside of our jurisdiction. Such action by the Commission would be an improper intrusion upon the jurisdiction of the state regulatory authorities (who have jurisdiction over the LDC customers), of Canadian regulatory authorities (with jurisdiction over the Canadian producers and pipelines), and DOE/FE (which has jurisdiction over the terms of the import).

The arguments raised by the Producer Associations are essentially the same arguments raised by the Producer Associations in the Iroquois proceeding. No other argument has been made in this proceeding to alter the determinations made in Opinion No. 357. In light of these facts, we reject the Producer Associations' request for rehearing on this issue.

In connection with the argument presented by the Producer Associations, Union Pacific contends that Commission policy requires consideration of the anticompetitive effects of Canadian rate design and of "Foothill rates", i.e., straight-fixed variable rates designed in accordance with the Canadian rate design. According to Union Pacific, as a direct result of Foothills' fixed- variable rates, domestic gas purchasers who contract for capacity on a Canadian pipeline will pay nearly all of the Canadian transportation rate in the demand charge. The argument continues that having incurred high demand charges to reserve capacity on the Canadian pipeline, shippers will have a stronger financial incentive to purchase and ship Canadian production than they would have if the Canadian rates were designed according to the MFV methodology. Based on the foregoing, Union Pacific requests that an evidentiary hearing be held.

We have no jurisdiction over the matters of concern to Union Pacific. We do not and cannot regulate or in any way affect the rate design of the Canadian pipelines. Moreover, in Opinion No. 357, the Commission specifically considered, and

rejected, alternative rate design proposals by domestic producers[65] that were designed to lower Iroquois' demand charge and increase its cost commodity charge in order to counterbalance the transportation rates on TransCanada PipeLines Limited, the Canadian pipeline. In rejecting these proposals, the Commission explained that it does not make comparable adjustments to the rates of domestic pipelines.

Further, as stated in *Opinion No. 357,* there are a number of practical difficulties associated with any attempt to modify the U.S. pipeline's rates in order to counterbalance the transportation rates of a Canadian pipeline. These difficulties include the administrative burden and delay associated with the review of all the individual import contracts, and the problem of obtaining cost data underlying the Canadian transportation rates so that adjustments to the jurisdictional transportation rates could be calculated. Neither the Canadian transportation service nor the entities providing that service are subject to the Commission's jurisdiction. For the reasons provided above Union Pacific's argument is rejected. Furthermore, as we find no basis in fact or law to convene an evidentiary hearing on this issue, Union Pacific's request for an evidentiary hearing is denied.

---

[65] In *Opinion No. 357,* we considered the alternative proposals presented by the Independent Petroleum Association of America (IPAA), the New England Fuel Institute, the Empire Petroleum Association, and Fuel Merchants Association of New Jersey (collectively referred to as the Oil Dealers).

E. *Unresolved anticompetitive issues*

1. *Incremental rate design costs*

Altamont contends that the January 22, 1991 order did not remedy several anticompetitive problems. First, states Altamont, the incremental rate design approved in the January 22, 1991 order has the effect of allocating to ratepayers in Northern California costs which are necessary to the delivery of expansion volumes to consumers in Southern California. These costs, state Altamont, include the capital costs of certain joint facilities, certain joint operation and maintenance costs, and certain general and administrative costs. Altamont contends that if the expansion shippers were required to bear their fair share of these costs, PGT's rates for transportation to Southern California would be higher and Altamont's rates for similar service would be more attractive. El Paso and Amoco voice the same concerns.

Altamont has simply restated arguments made, considered and rejected in our January 22, 1991 order.[66] The allocation of costs incurred by the PGT system, including the joint-use of facilities as alleged by Altamont is clearly a matter better suited for further analysis in PGT's rate proceeding when the costs of such facilities and their use are more specifically indicated. The Commission states again that PGT must file new general system rates to be effective no later than November 1, 1993, which coincides approximately with the expansion project's anticipated in-service date.

2. *Future rolled-in costs*

Altamont contends that as a means of inducing its shippers to support its settlement, PGT agreed not to oppose the use of rolled-in rates with respect to the expansion capacity in future rate proceedings, including the one it intends to commence within 14 months of the in-service date of the expansion project. Altamont states that although the Commission has rejected

---

[66] *See* 54 FERC at pp. 61,148-150.

PGT's settlement offer, it has not prohibited PGT from making similar offers to its shippers in the future. Altamont argues that such rate treatment would result in present ratepayers being assigned a substantial portion of the costs of the expansion project.

Ordering Paragraph (J) of the January 22, 1991 order made clear that, when PGT files to change its rates (as it must do by November 1, 1993), any party "may propose new rates based on different methodologies, principles or concepts."[67] Altamont provides no reasoned explanation why the Commission should, at this time, preclude any such party from supporting rolled-in rate treatment and submitting evidence on that issue. To prejudge the issue, as Altamont would have us do, would not be reasoned decision-making.

3. *PG&E subsidization of costs*

Altamont contends that PGT's decisions to expand the capacity of the expansion project from 600,000 Mcf per day to 755,000 Mcf per day and to reserve 100,000 Mcf per day of that capacity for PG&E was undertaken for anticompetitive purposes. According to Altamont, because PG&E is able to roll into its rates the costs of its subscription to 100,000 Mcf per day of expansion capacity, it is able to sell its gas in Northern California despite the higher transportation cost. Moreover, it states, by paying the higher transportation cost, PG&E in effect subsidizes the rate paid by other expansion project shippers for transportation to Kern River Station. PG&E no longer has reserved capacity and hence this issue is moot.

4. *Subscription of Williams Gas Marketing Company*

Altamont requests an investigation into the circumstances surrounding the subscription of Williams Gas Marketing Company (Williams) for capacity on the PGT/PG&E expansion project from Stanfield, Oregon to Kern River Station. Altamont states that in the amended application, PGT reported that it

---

[67] 54 FERC at p. 61,162.

had an exclusive precedent agreement for 50,000 Mcf per day of capacity with Williams, a subsidiary of Northwest. However, Altamont contends, in the certificate application that Northwest recently filed with the Commission regarding the upstream delivery facilities, Northwest reported that PGT, not Williams, had subscribed to this capacity. Williams is no longer a subscriber of capacity and hence this issue is moot.

F. *Commission's refusal to exert jurisdiction over PG&E's proposed facilities and services*

Amoco observes that in the January 22, 1991 order the Commission noted that the interrelationship of the PGT portion and the PG&E portion of the expansion project may be an illegal tying arrangement between interstate and intrastate transportation.[68] Amoco believes that simply requiring PGT to provide for transportation to the California-Oregon border, rather than to Kern River in California, and stating the PG&E rates should also be unbundled, was inadequate to prevent PGT and PG&E from acting in concert to provide interstate transportation to Southern California and to deny use of the expansion project to Northern California shippers. Amoco believes that PG&E's filings before the CPUC demonstrate that PG&E's intent is to prevent use of the expansion project for deliveries into Northern California by the design of postage stamp rates and by a requirement that shippers in California use PG&E's portion of the expansion project. Amoco notes that PG&E views its distribution facilities in California as separate and distinct from its expansion project. Amoco believes that PG&E should be required to file its expansion application with the FERC so that the Commission can require open and nondiscriminatory transportation on the transportation project.

The Amoco Group, Kern River, and Altamont contend that the Commission erred in not asserting jurisdiction over

---

[68] As will be discussed later in this order, the Commission acknowleges the potential problem that an improper tying arrangement between PGT and PG&E may exist.

PG&E's California portion of the expansion project. The Amoco Group and Kern River, for example, state that the PG&E portion of the expansion project is a necessary and integral part of the interstate service proposed by PGT and the Commission is unable to address many of the discriminatory and anticompetitive aspects[69] of the expansion project unless it exercises jurisdiction over both the PGT and the PG&E portion of the expansion project.

In addition, the Amoco Group and Kern River state that although PGT claims that the CPUC has jurisdiction over the California portion of the expansion project which portion is exempt from the Commission jurisdiction pursuant to the Hinshaw exemption of the NGA,[70] PGT and PG&E by their unified actions with respect to the expansion project have wiped away the "person-to-person" transfer at the California border that must exist for PG&E to preserve its Hinshaw exemption.[71] In

---

[69] For example, the Amoco Group claims that the January 22 order recognizes: (1) that the expansion project discriminates against nonutility shippers by insulating PG&E's market area from competition by requiring expansion shippers to take delivery of gas at the Kern River Station in southern California, and (2) that the interrelationship of the PGT portion and the PG&E portion of the expansion may be an illegal tying arrangement between interstate and intrastate transportation.

[70] Section 1(c) of the NGA, 15 U.S.C. § 717(c) (1988). This section of the NGA, often called the "Hinshaw" amendment for the Congressman who sponsored it, provides in relevant part that:

> [t]he provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce for resale, of natural *gas received by such person from another person* within or at the boundary of a State if all the natural gas so received is ultimately consumed within such state, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a state commission. (Emphasis added.)

[71] Specifically, they state, the unified actions are evidenced by the fact that: (1) precedent agreements had to be signed with both PGT and PG&E; (2) financing for the PGT portion of the project depends on revenues from the California portion of the project; (3) the service on the

(footnote continues)

other words, they state, PG&E is a local branch of an integrated interstate pipeline system that receives the bulk of its gas at Kingsgate, British Columbia, rather than a separate local distribution company that receives gas at or within the borders of California.

Altamont raises arguments similar to those advanced by Kern River and the Amoco Group. In addition, Altamont points out that the Commission has previously suggested that PG&E's proposed facilities might be subject to its jurisdiction.[72]

Altamont also contends that Commission review of PG&E's portion of the expansion project is necessitated by the inconsistent findings of the CPUC in its recent decision certificating the PG&E portion of the expansion project. Unlike the Commission's findings, the CPUC, among other things, (1) found that PG&E's initial open-season procedures were not unduly discriminatory and (2) approved PG&E's requirement that all gas volumes be delivered to a single delivery point at Kern River Station. Altamont argues that even the new open-season procedures recently filed by PGT in purported compliance with the January 22, 1991 order make no mention of Northern California delivery points and associated rates required by the Commission.

Finally, states Altamont, in the notice of its intent to prepare a joint draft environmental impact statement covering both the expansion project and the Altamont project, the Commission noted that the PGT and PG&E expansion proposals are

---

(footnote continued)

PGT portion was tied to service on the PG&E portion; (4) PGT is acting as the constructor and manager of the California portion of the project; and (5) a PG&E witness testified before the CPUC that the expansion is a "single entity."

[72] *Citing Alcan Pipeline Company,* 1 FERC ¶ 61,248, at p. 61,643, n.3 (1977) (for the statement that the "Commission is not prepared . . . to agree . . . that the portion of the 'Western Leg' within California is covered by the 'Hinshaw Exemption' . . . Therefore, . . . subsequent events may necessitate PG&E filing with the Commission an application for a certificate of public convenience and necessity").

being considered together as one project for the purpose of environmental review.

Notwithstanding the arguments raised above, we cannot exercise jurisdiction over the PG&E expansion project. PG&E, a Hinshaw pipeline whose existing and planned expansion facilities are located entirely in the State of California, is exempt from Commission jurisdiction pursuant to section 1(c) of the NGA.[73] Under that section, a party obtains or maintains its Hinshaw status if the following conditions are met:

- All the gas a person transports or sells is received from another person is within or at the boundary of the state;
- The gas is consumed within the state;
- The pipeline's rates, services and facilities are regulated by the state.

While we agree that PGT's and PG&E's actions with regard to management, financing and contracting of their respective portions of the expansion project have been coordinated, we find nothing inappropriate about such coordinated activities between affiliates in the absence of proof that undue discrimination has resulted thereby. No such proof has been gleaned from the record. In any event, we do not agree (as has been argued) that such actions have wiped away the "person-to-person" transfer at the California border that must exist for PG&E to preserve its Hinshaw exemption. To the contrary, as currently proposed in the expansion application, PGT would transport gas from Kingsgate, British Columbia to the California border near Malin, Oregon, where PG&E (a separate affiliated entity) will receive the gas for redelivery to utility and nonutility customers which will consume that gas in the State of California. The transfer of gas from PGT to PG&E satisfies the

[73] On August 27, 1954, the Commission granted PG&E a Hinshaw exemption in Docket No. G-2489.

"person-to-person transfer" criteria of section 1(c) of the NGA.[74]

Similarly, the remaining Hinshaw criteria are met. No party alleges (nor is there evidence to suggest) that any gas received by PG&E from PGT at the California border is consumed outside the State of California. In addition, while Altamont suggests that the CPUC's findings do not parallel the Commission's findings with respect to certain anticompetitive and unduly discriminatory behavior, no one has argued (nor is there evidence to suggest) that the CPUC does not regulate the rates, services and facilities of PG&E. Moreover, we have noted previously that the construction and operation of the PG&E expansion facilities involve intrastate services to be regulated by the CPUC.[75]

We find misplaced Altamont's reference to the *Alcan* case, *supra,* as support for the argument that the Commission has suggested that PG&E's proposed facilities might be subject to its jurisdiction. There, a Alcan Pipeline Project Group (Alcan group) contended that the portion of the "Western Leg" of the Alaskan Natural Gas Transportation System (ANGTS) within California is subject to the CPUC's jurisdiction and that PG&E, which was designated by the President to construct that portion

---

[74] *See Commonwealth Gas Pipeline Corporation et al.,* 31 FERC ¶ 61,275, at p. 61,562 (1985). There, we stated:

> Section 2(1) of the NGA defines the term "person" to include an "individual or corporation." A Corporation has historically been defined as "an artificial person or legal entity created by or under the authority of the laws of the state . . . (Footnote omitted.) Notwithstanding their affiliate relationship, Columbia [Gas Transmission Corporation] and Commonwealth by definition are separate legal entities or persons, and the fact that their activities may be in concert with one another or coordinated through the efforts of Columbia does not vitiate the fact that they are separate persons within the meaning of section 1(c).

[75] *See, e.g., Altamont Gas Transmission Company,* 53 FERC ¶ 61,395, at p. 62,375 (1991).

of the "Western Leg," did not join in the motion for a conditional certificate. In response, the Commission stated that it was not able "at this preliminary juncture to agree with the Alcan group that the portion of the 'Western Leg' within California is covered by 'Hinshaw Exemption.' " The Commission has never issued PG&E an ANGTS certificate (conditional or otherwise). Thus, it is premature to conclude, based on that statement, that the Commission might reconsider PG&E's Hinshaw exemption. In any event, we note that subsequent to the *Alcan* case the Commission has reaffirmed the nonjurisdictional status of PG&E.[76]

Finally, we find equally misplaced Altamont's argument that the PGT expansion project and the PG&E expansion project should now be considered as a single interstate pipeline since the Commission noted in its notice of its intent to prepare a joint draft environmental impact statement that the PGT and PG&E expansion proposals are being considered together as one project for the purpose of environmental review. The decision to review the PGT and PG&E expansion proposals together for environmental purposes was prompted by the requirements of the Endangered Species Act of 1973 and the National Historic Preservation Act.[77] The decision was not prompted by any concerns over jurisdiction. In any event, under our normal procedures, when (as in this proceeding) nonjurisdictional facilities have been approved or are in the process of detailed review at the state level,[78] we will limit our review of

---

[76] *See, e.g., Altamont Gas Transmission Company, supra,* 53 FERC at p. 62,375, where the Commission stated that PG&E is a "non-jurisdictional local distribution company whose existing and planned expansion facilities are located entirely in the State of California, [and] is not required to file its related expansion application with this Commission."

[77] *See generally,* the respective legislation, which requires that the Commission consider the potential indirect effects of federally listed or proposed threatened and endangered species, and cultural resources associated with these nonjurisdictional facilities.

[78] The PG&E expansion facilities are also subject to the requirements of the California Environmental Quality Act (CEQA).

the nonjurisdictional facilities and incorporate, to the extent deemed necessary, the environmental protection recommendations of the state agency.

Accordingly, the requests for rehearing on the Commenters with regard to the PG&E jurisdiction issue are denied.

G. *Need for a comparative hearing*

The January 22, 1991 order rejected Altamont's argument that a comparative hearing is warranted under Ashbacker for the Altamont and PGT projects since they are competing projects.[79] The Commission concluded: (1) that Altamont had not demonstrated that Altamont and PGT will serve the same market, and (2) that the PGT project and the Altamont project are at different stages of development.

Arguments

Altamont contends that neither reason justifies the Commission's failure to hold a comparative hearing. According to Altamont, the first argument lacks credibility considering that the PGT expansion filing suffers from the same market and supply defects which was the premise of the Commission's dismissal of Altamont's section 7(c) application. In this regard, states Altamont, these inadequacies have prompted the Commission to impose conditions on PGT's expansion authorization that effectively blur the distinction between its traditional and optional certificate procedures. Thus, Altamont concludes, the Commission is requiring PGT to bear the economic risk that its shippers will not receive import authority for supply volumes sufficient to recover the project's costs as well as the risk that certain necessary upstream Canadian facilities will not be built.[80]

---

[79] *Ashbacker Radio Corporation v. FCC,* 326 U.S. 327 (1946) (holding that "where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.")

[80] *Citing* 54 FERC at pp. 61,158-61,159.

In addition, Altamont states that both PGT and Altamont seek authority to construct and operate facilities that will carry Canadian natural gas to the Southern California market. In addition, states Altamont, both PGT and Altamont in their respective applications make clear that the Southern California market cannot support the proposed capacity of both projects until at least the next century. Moreover, it states, the Commission itself has indicated that "the Altamont Project is an alternative to the PGT/PG&E Expansion Project," and PGT's efforts to prevent customers in the region from dealing with any other pipeline suggests the applications are mutually exclusive.

As to the argument that the Altamont project is at a less advanced stage of development, Altamont asserts that both parties have been directed to conduct open seasons. Also, states Altamont, the environmental mitigation work that is needed for the expansion project far exceeds the work that will be required for the Altamont project. For these reasons, states Altamont, on rehearing the Commission must establish comparative hearing procedures.

Finally, Altamont states that since it is clear that the Kern River System will be expanded and combined with the Altamont project to transport gas to Southern California, it is also important for the Commission to consider the fact the Altamont project (via greater economies of scale,[81] lower prices[82] and avoidance of $545 million in capital investments) will provide gas consumers with substantially more benefit than the PGT project. Altamont's argument that because PGT's

---

[81] Altamont states that the combined cost of constructing the Altamont project and expanding the Kern River System, which is approximately $750 million, is lower than the cost of constructing the PGT/PG&E expansion project. We note that Kern River is a joint project with Mojave Pipeline which would raise the cost figure to approximately $1 billion. The entire cost of the Kern River-Mojave-Altamont system would have to be compared with PGT's expansion.

[82] According to Altamont, the transportation costs of Wyoming gas would be reduced dramatically (approximately 17 cents per Mcf, making these domestic supplies significantly more competitive.

application is being treated as a traditional section (c) application a comparative hearing with either Altamont or Kern River is flawed. The preliminary determination contemplated that certificate to be issued to PGT would be a risk certificate. As indicated below, requests for rehearing of this issue by Altamont remain tolled. Regardless of how this issue is ultimately resolved, however, a comparative hearing will not be required. The project constructed and operated under the risk certificates and optional certificates issued by the Commission proceed on their own separate tracks with the economic risks of interpipeline competition placed squarely on the pipeline companies involved.

H. *The need for an evidentiary hearing and the establishment of discovery procedures*

Argument

Altamont states that the Commission erred in not establishing an evidentiary hearing and discovery procedures. Altamont contends that discovery procedures are not only necessary to develop a record from which the Commission can reach a reasoned decision, but are required as a matter of law.[83]

Regarding the Commission's denial of its request for an evidentiary hearing, Altamont states that the Commission has been directed to conduct hearings to address the adequacy of supply[84] and the rate impact of customer under-nominations.[85] In fact, Altamont argues, "an evidentiary hearing 'may be

---

[83] *Citing FPC v. Sunray DX Oil Company,* 391 U.S. 9, 51-52 (1968) for the proposition that the Commission's statutory obligation implies that "when interested parties assert that the Commission has permitted or is about to permit the sale of significant quantities of unneeded gas, then the Commission must supply an adequate forum in which to hear their contentions."

[84] *Citing General Motors v. FERC,* 656 F.2d 791 (D.C. Cir. 1981).

[85] *Northern Indian Public Service Company v. FERC,* 782 F.2d 730, 745-746 (7th Cir. 1986).

appropriate even where there is no evidentiary dispute, strictly speaking, if that matter requires orderly discussion and presentation of a number of interrelated policy and legal issues requiring careful ventilation, with the possibility that witnesses as well as counsel may provide factual perspective even in the absence of specific factual controversy.' "[86] Moreover, states Altamont, a hearing may be necessary if the written submissions do not afford an adequate basis for resolving disputes about material facts. For the same reasons, states Altamont, an evidentiary hearing is warranted in this proceeding.

Response

We deny the requests for a trial-type hearing. The NGA and the case law require the Commission to provide the parties with a "meaningful opportunity for hearing."[87] However, the Commission is required to reach decisions on the basis of an oral, trial-type evidentiary record only if the material facts in dispute cannot be resolved on the basis of the written record.[88] A trial-type hearing is thus required only when the written submissions do not provide an adequate basis for resolving disputes about material facts.[89] This might occur if a witness'

---

[86] *Citing Southern Union Gas Company v. FPC,* 536 F.2d 440, 442 (D.C. Cir. 1976).

[87] *Citizens for Allegan County, Inc. v. FPC,* 414 F.2d 1125, 1128 (D.C. Cir. 1969).

[88] *Amador Stage Lines, Inc. v. U.S.,* 685 F.2d 333 (9th Cir. 1982) (upholding the Interstate Commerce Commission's use of written submissions in a certificate proceeding); *Boston Carrier, Inc. v. ICC,* 728 F.2d 1508, 1511 n.5 (D.C. Cir. 1984) (*citing Amador* and stating, "We do not believe the Commission abused its discretion by refusing to hold an oral hearing in this case since it reasonably could have found the factual disputes to be resolvable using its modified procedure."). *See also American Public Gas Association v. FPC,* 567 F.2d 1016, 1067 (D.C. Cir. 1977); *Wisconsin Gas Co. v. FERC,* 770 F.2d 1144, 1168 n.41 (D.C. Cir. 1985), *cert. denied,* 476 U.S. 1114 (1986).

[89] Mere conjecture does not create a genuine issue of material fact. *See, e.g., Citizens for Allegan County, Inc., v. FPC,* 414 F.2d at 1128.

motive, intent, or credibility needs to be considered in addition to the documentary evidence. This might also occur where the issue involves a dispute over a past occurrence and a trier-of-fact may be needed to ascertain the credibility of the witness in order to decide which account of the circumstances is credible.

In this proceeding, there has been no showing that factual evidence developed through the extensive written submissions in the record will not suffice to establish an evidentiary predicate for the Commission to conclude that the expansion project is in the public convenience and necessity. Accordingly, where, as here, a party has not specified why it is unable to develop facts through written submissions, a mere demand for discovery and/or cross-examination without detailing the particular lines of discovery and/or cross-examination will not suffice.[90] Thus, we find that under the appropriate legal standards, based upon the current record, there are no issues of material fact in dispute that cannot be resolved on the record.

We reject also challenges to our failure to allow for discovery during the course of the proceeding. The APA does not provide for pre-trial discovery. The extent of discovery to which a party is entitled is determined primarily by the particular agency involved.[91] Thus, agencies are free to fashion their own rules of procedure, so long as these rules satisfy the fundamental requirements of fairness and notice.[92] Pursuant to the Commission's regulations at section 385.410(c), the "presiding officer may . . . deny or limit discovery . . . in order to: . . . (2) prevent undue delay in the proceeding."

I. *Impact of expansion project on the ANGTS*

PGT has two firm pipeline transportation customers, Northwest and Pacific Interstate. In 1961, PGT began service

---

[90] *Amador Stage Lines, Inc.*, 685 F.2d at 333 (It is up to the petitioner to show that "its position could not be adequately presented in writing.").

[91] *See, generally, Pacific Gas and Electric Co. v. FERC*, 746 F.2d 1383, 1387 (9th Cir. 1984).

[92] *Katzson Brothers, Inc. v. EPA*, 839 F.2d 1396, 1399 (10th cir. 1988).

for PG&E and Northwest's predecessor, El Paso, over facilities which were certificated in 1960.[93] Using the original facilities, PGT transports up to 150.7 MMcf/d of Canadian gas for the account of Northwest to delivery points in the states of Idaho, Washington and Oregon. PGT's original facilities interconnect with those of Northwest near Stanfield, Oregon.

PGT also transports up to 300 MMcf/d of Canadian gas on behalf of Pacific Interstate through its existing system for delivery at the interconnection with the Northwest system near Stanfield. The firm service for Pacific Interstate is provided by 160.1 miles of existing 42-inch pipeline which loops portions of the 36-inch original facilities north of Stanfield. This looping was certificated in 1980 and constructed in 1981 as part of the Western Leg of the Alaska Natural Gas Transportation System (ANGTS) and is referred to as the "prebuild" facilities.[94] PGT also provides interruptible gas transportation for a number of shippers under section 7(c) of the NGA and section 311 of the NGPA. PGT states that its proposed facilities, together with the expanded California facilities of PG&E, will complete the U.S. portion of the Western Leg of the Alaska Natural Gas Transportation System (ANGTS).[95]

---

[93] These facilities, originally certificated in *Pacific Gas Transmission Company,* 24 FPC 134 (1960), are referred to as the "original facilities" and consist of approximately 639 miles of 36-inch gas transmission lines and other related facilities certificated from 1960 to 1970.

[94] The prebuild facilities were originally certificated by the Commission by orders issued January 11, 1980, January 13, 1980 and June 13, 1980 in Docket No. CP78-123 *et al. Northwest Alaskan Pipeline Company et al.,* 10 FERC ¶ 61,032 (1980); 10 FERC ¶ 61,096 (1980), 11 FERC ¶ 61,302 (1980).

[95] According to PGT, PGT and PG&E have been selected by the President to construct and operate the U.S. portion of the Western Leg of the ANGTS and to transport Alaskan North Slope gas to the lower 48 states under ANGTA. The Commission has issued PGT a conditional certificate to construct and operate the Western Leg and a final certificate to prebuild a portion thereof. The prebuilt U.S. portion of the Western Leg consists essentially of looping of the existing PGT and Northwest

(footnote continues)

Arguments

In its technical conference comments and other pleadings filed in Docket Nos. CP89-460-000 and CP89-460-001, PGT explained that the design of the expansion facilities consists of a combination 42-inch pipe and 57,000 hp of compression. This design, PGT states, is compatible with the design authorized by the Secretary of Energy and the Commission for the ANGTS prebuild looping which was installed in 1981. In addition, states PGT, the expansion project design is economically expandable to handle increased Alaskan gas volumes through the installation of additional compression. Specifically, PGT states that projecting the expansion system to roughly the same compression ratio as the existing system provides a useful proxy for the amount of additional volume that could be made available at a modest cost. PGT estimates that as much as 500,000 Mcf per day could be delivered at Malin by installing approximately 200,000 hp of compression at a cost of approximately $150 million (1990). If higher volumes were desired, PGT states that a third loop line could be constructed.

In their requests for rehearing and protests to the amendment, the Amoco Group and Altamont contend that the January 22, 1991 order failed to consider the impact of PGT's expansion project on the ANGTS. The Amoco Group states, for example, that PGT failed to file its application under ANGTA, even though the expansion facilities will complete the U.S. portion of the Western Leg of ANGTS. It states that PGT's silence as to the applicability of ANGTA to its expansion

---

(footnote continued)

systems. The facilities proposed herein will complete the looping contemplated in the original conditional certificate and provide the same beneficial effect as the original prebuild which is to allow for early construction at lower cost, of facilities that will ultimately connect to Alaskan gas supplies. (*See Pacific Gas Transmission Company,* 1 FERC ¶ 61,248 (1977); *Pacific Gas Transmission Company,* Docket No. CP78-123, *et al.,* 10 FERC ¶ 61,032 (1980); 10 FERC ¶ 61,096 (1980); 11 FERC ¶ 61,088 (1980)).

project does not and cannot relieve the Commission of its statutory obligations. The Amoco group states that if the expansion project is found to be part of ANGTS, then the Commission's approval of the project, predicated upon long-term transportation agreements with shippers to move Canadian gas, is inconsistent with the intent and purpose of ANGTA. On the other hand, states the Amoco Group, if the expansion project is separate from ANGTS, the Commission is still required to determine whether the expansion project will interfere with the future construction of remaining portions of the Western Leg when additional capacity is needed to move Alaskan gas, and whether the expansion project will impede in any other way the viability of a completed Western Leg to move Alaskan gas.

Altamont states that while the January 22, 1991 order concluded that the PGT portion of the expansion project together with the PG&E portion of the expansion project will complete the U.S. portion of the Western Leg of the ANGTS, the order did not discuss the impact of the expansion project on the continuing viability of the ANGTS or the flow of Canadian gas through the ANGTS facilities. According to Altamont, although PGT has concluded that the design of the expansion project is economically expandable to handle the Alaskan gas, and that such expansion can be achieved either by the addition of compression at modest cost or by commencing the third loop line, such claims are unfounded. For this reason, Altamont contends, the Commission must address: (1) whether Canadian gas purchased by SoCal would be displaced by Alaskan Gas when ANGTS is completed, and (2) whether the environmental impact of adding compression and looping will preclude the completion of ANGTS before PGT begins construction.

Commission Response

At the outset, we note that the Amoco Group does not point to (nor are we aware of) any ANGTA provision or relevant case law which requires that PGT file its expansion application under ANGTA, particularly since the expansion

application is not related to the ANGTS prebuild transactions previously authorized by the Commission. Accordingly, PGT will not be required to file an application under ANGTA.

Furthermore, we have examined independently whether the expansion project is economically expandable to handle the Alaskan gas.[96] Our examination reveals that PGT's facilities have been properly designed to transport not only the level of volumes proposed in the expansion application but also the level of dedicated prebuild ANGTS volumes (659 MMcf per day) to Malin, Oregon, or at the California border with the addition of compression. Because we conclude that PGT's expansion proposed herein would not interfere with the ANGTS and would be able to accommodate ANGTS volumes with compression and/or looping, we will deny Altamont's request for rehearing on this issue.

J. *Failure to consider alternative pipeline projects*

The Amoco Group, Producer Associations and Union Pacific allege that the January 22, 1991 order failed, in its public convenience and necessity analysis, to consider the impact of alternative pipeline projects. They state that if Kern River, Altamont, and Transwestern were all built, there would be not any need for the PGT project, since those projects would provide much more capacity than the CPUC projected would be needed in California in the near and longterm.[97]

---

[96] In particular, we examined the possibility of delivering the extra 500 MMcf per day from Kingsgate, B.C. to the Antioch, California terminal located in central California through PG&E. In addition, we also analyzed possible deliveries of 659 MMcf per day to Antioch because this is the volume which would have been dedicated to the Western Leg of the ANGTS. Finally, while a cost comparison of alternatives—additional horsepower only vs. horsepower plus looping—revealed similar costs for each, we note that the latter alternative would result in additional cost fuel savings.

[97] According to these petitioners, the CPUC estimated a need for 900 MMcf per day of new interstate capacity into California in the near term,

(footnote continues)

We find these arguments misplaced. Indeed, our optional certificate regulations (as they relate to our preliminary approval of the Altamont and Kern River optional certificate applications referred to by the petitioners) specifically provide that "a[n] [optional] certificate issued pursuant to this subpart must be non-exclusive and must provide that it in no way prejudices any application for any other certificate under the Natural Gas Act . . . "

Moreover, we stated previously that "the potential superiority of the proposal is immaterial where ... [an optional certificate] pipeline has agreed to assume the economic risk of its project and has otherwise satisfied all of the requirements of the optional certificate regulations."[99] While the language quoted above is applicable to optional certificate pipelines, we believe that the language is equally applicable to Transwestern since it was placed "at-risk" for the underutilization of its proposed facilities.[100] In any event, we are not convinced that Altamont, Kern River, and Transwestern will be serving the same market since Transwestern, Altamont and Kern River did not file the necessary market data to enable the Commission to

---

(footnote continued)

and between 1.6 Bcf per day and 2.1 Bcf per day of new interstate capacity into California over the long-term period from now to 2005. Upon construction, they state, Kern River will provide 1.1 Bcf per day of additional capacity (700 MMcf per day from Kern River's Wyoming-California system and 400 Mcf per day from the Arizona-California system of Mojave Pipeline Company). In addition, they state that the Commission has preliminarily approved: (1) the construction of 700 MMcf per day of additional capacity delivered through an expanded Kern River system for Transwestern Pipeline Company in Docket No. CP90-2292 and (2) the construction of 700 MMcf per day of additional capacity through the Kern River system for Altamont in Docket No. CP89-1372-000.

[99] *Delta Pipeline Company,* 52 FERC ¶ 61,004, at p. 61,050 (1990), *reh'g denied in part and granted in part and clarification granted,* 53 FERC ¶ 61,002 (1990), *erratum notice issued,* 54 FERC ¶ 61,118 (1991).

[100] *See* Ordering Paragraph (E) of *Transwestern Pipeline Company,* 54 FERC ¶ 61,031, at p. 61,095 (1991).

make that determination.[101] In this regard, we note that although the Altamont and Kern River systems were designed in large part to serve the EOR market in Kern River County, California, PGT has stated that it does not intend to serve the EOR market.

K. *Tariff revision*

We have reviewed the newly submitted pro forma tariff sheets and we will require Altamont to modify certain tariff sheets consistent with the discussion below.

1. *Proposed New Tariff Sheets*

a. *Capacity Brokering*

In revised Rate Schedule T-3, PGT has added a new section 6.2 (formerly section 7.7 of its form of service agreement).[102] In the March 15 order, the Commission directed PGT to remove former section 7.7 (now section 6.2) from its form of service agreement. Specifically, the Commission stated (54 FERC at p. 61,832):

> We note that on May 7, 1990, PGT filed a capacity brokering program in Docket No. CP90-1031-000. Under that program, the rights of PGT's firm transportation customers could be assigned to third parties for a limited term. Since the capacity brokering proposal is pending review in Docket No. CP90-1031-000, issues relating to the propriety

---

[101] The optional certificate regulations did not require Kern River and Altamont as optional certificate applicants to file certain market data with the Commission and Transwestern was placed "at-risk" for failing to supply critical market data with the Commission.

[102] Section 6.2 of revised Rate Schedule T-3 provides:

> Under this rate schedule and Shipper's executed Firm Transportation Service Agreement, Shipper may not permanently assign its rights until after the Expansion Facilities have commenced commercial operation. Thereafter, Shipper may assign its rights under this rate schedule and Shipper's executed Firm Transportation Service Agreement *in accordance with Paragraph 19.2 of the General Terms and Conditions* of this FERC Gas Tariff Second Revised Volume No.1. (Emphasis added.)

of the capacity brokering program are more appropriately raised and addressed in that proceeding. Accordingly, we will require PGT to remove the capacity brokering provision from its service agreement.

For the reason noted above, the Commission will also require PGT to remove the capacity brokering provision of sections 6.2 and 6.1 from Rate Schedule T-3.[103]

We note that section 6.2 has an additional flaw. Contrary to the implication of the underscored language of section 6.2, Paragraph 19.2 of the General Terms and Conditions does not address matters relating to capacity brokering, although it refers the assignment rights of the parties to the service agreement with regard to security for indebtedness.[104] Therefore, the reference to Paragraph 19.2 is inappropriate.

---

[103] Section 6.1 of pro forma Rate Schedule provides:

Under this rate schedule, Shipper may temporarily assign all or part of its firm transportation capacity pursuant to its capacity entitlement as stated in Shipper's executed Firm Transportation Service Agreement in accordance with the rules of the capacity assignment program that PGT accepts from the FERC in Application No. CP90-1031-000. However, Shipper may not exercise its rights under this Paragraph 6.1 until the Expansion Facilities have been placed in commercial operation by PGT.

[104] Section 19.2 of the General Terms and Conditions provides:

A service agreement shall bind and inure to the respective successors and assigns of the parties thereto, but no assignment shall release either party from such party's obligations without the written consent of the other party, which consent shall not be unreasonably withheld. Nothing contained herein shall prevent either party from pledging, mortgaging or assigning its rights as security for its indebtedness and either party may assign to the pledgee or mortgagee (or to a trustee for the holder of such indebtedness) any money due or to become due under any service agreement.

b. *Initial Line Pack*

Pursuant to our directive in the March 15 order (54 FERC at p. 61,831), PGT deleted its then-proposed line pack provision (section 5.3).[105] However, the currently proposed line pack provision (section 7 of Rate Schedule T-3, Pro Forma Original Sheet No. 36) requires PGT to provide initial line pack for the shipper's *pro rata* share of transportation service and to collect the cost of such initial line pack from the shipper as part of the shipper's rates. We have no objection to the provision since PGT's initial rates approved by the Commission in the January 22 order include the cost of initial line pack.

c. *Uniform Terms of Service*

Although in the March 15 order we agreed that section 7.8 should be included in the service agreement, we stated that the parties to the PGT expansion proceeding should have an opportunity to comment on the inclusion of such provision in the service agreement.[106] Thus, we directed PGT to resubmit its proposed section 7.8 in its proposed form of service agreement.[107] PGT now has included this provision at section 11 of Rate Schedule T-3 (Original Sheet No. 38). We will approve section 7.8 since it fosters nondiscriminatory service.

d. *Curtailment*

Section 8 of Rate Schedule T-3 in pertinent part provides:

---

[105] Line pack is defined as "the quantity of natural gas that is necessary to fill the pipeline itself, so as to maintain necessary operating pressures." *Kern River Gas Transmission Company,* 50 FERC ¶ 61,069, at p. 61,156 (1990).

[106] Proposed section 7.8 of the form of service agreement provided that:

> if PGT modifies or changes any term or condition specified in an effective Firm Transportation Service Agreement with any Shipper receiving service under this rate schedule, within sixty (60) days thereafter, PGT shall offer to make the same term(s) and condition(s) available to any other shipper then receiving service under this rate schedule.

[107] 54 FERC at p. 61,832.

> When PGT needs to temporarily curtail or interrupt service to Shipper for any reason relating to the maintenance or operation of PGT's facilities, PGT shall give shipper as much notice as possible, but not less than forty-eight (48) hours except in case of emergency. *In any such event, PGT shall use the remaining available firm capacity on its entire combined system, to the extent reasonable within the operational limitations of that system,* to deliver gas to all firm sales and transportation customers in the same proportion as each individual firm customer's total Maximum Daily Quantity bears to the total of all firm customers' Maximum Daily Quantities. (Emphasis added.)

We will require PGT to delete or revise the underscored language quoted above because it allows PGT to disrupt service to its existing customers on its existing system in order to provide partial service to its new expansion shippers. A pipeline should not be able to propose a new service which ultimately jeopardizes the capacity rights of existing shippers without their participation and concurrence. The revised language should state that:

> In any such event, PGT shall use any available capacity on its expansion, to the extent reasonable within the operational limits of the expansion, to deliver gas to all T-3 transportation customers in the same proportion as each individual firm customer's total Maximum Daily Quantity bears to the total of all firm customers' Maximum Daily Quantities. If excess capacity is available at that time on the existing system, that excess capacity may also be used for the means to provide transportation service to the expansion shippers, *as long as the use of such excess capacity for that purpose does not disrupt service to the existing shippers.*

e. *Shipper Obligation*

In the January 22 order (54 FERC at p. 61,152), the Commission held that language[108] regarding a shipper's unconditional obligation to make reservation payments was too restrictive and onerous since it required shippers to pay for the transportation service under any *force majeure* circumstances and since it has the effect of guaranteeing revenue. In response, PGT filed a filed a new section 6.1 of the revised service agreement.[109] However, in the March 15 order, we required PGT to resubmit the new section 6.1 since the rate schedule referred to in the proviso "except as otherwise provided in the applicable rate schedule approved in Docket No. CP89-460" had not been submitted for review.[110] Thus, we stated that we were unable to determine if the January 22 directive had been satisfied.

Although PGT has removed the "absolute and unconditional" obligation language from its revised section 6.1 of the service agreement (Original Sheet No. 156), PGT now seeks approval of similar language in section 5.1 of Rate Schedule T-3 (Original Sheet No. 31). That section provides:

---

[108] The January 22 order reviewed article 4.1 of PGT's proposed Pro Forma Tariff which provided:

No cause whatsoever, including without limitation the failure of PGT to perform and the causes specified in Paragraph 12.1 of the General Terms and Conditions, shall relieve Shipper from its obligation to make payments due including the payments of Reservation Charges. (Emphasis added.)

[109] The revised section 6.1 of the revised service agreement provided:

Notwithstanding anything herein to the contrary, including the provisions of Article I hereof, Shipper's obligation to pay the FERC approved Reservation Charge as authorized by the FERC in Docket No. CP89-460 or the comparable provision of any superseding FERC order, is *absolute and unconditional,* except as otherwise provided in the applicable *rate schedule* approved in Docket No. CP89-460. (Emphasis added)

[110] March 15 order, 54 FERC at p. 61,832.

> Shipper's obligation to pay the Reservation Charge is *absolute and unconditional* and is independent of Shipper's ability to obtain export authorization from the National Energy Board of Canada, Canadian provincial removal authority, and/or import authorization from the United States Department of Energy, and shall begin with the execution of the Firm Transportation Service Agreement by both parties. (Emphasis added.)

We direct PGT to remove as overly broad from this section the language "Absolute and unconditional and is." The remainder of the language can remain. This language is similar to that approved in *Iroquois*.

f. *Rates*

We note that unlike the incremental rates (expressed on an Mcf basis) under consideration by the Commission in the January 22 order, PGT's incremental rates provided in its March 25 filing are expressed on an MMBtu basis. PGT makes this change from Mcf to MMBtu to be consistent with its position in its latest rate case in Docket No. RP90-109-000. We have reviewed the newly stated MMBtu incremental rates and the MMBtu conversion factor utilized for changeover and find them acceptable.

g. *Delivery Point Omission*

In our review of the proposed tariff, we found an omission. PGT failed to include its delivery point at Rathdrum, Idaho on its *Pro Forma* Tariff sheet, Original Sheet No. 5A. Accordingly, PGT is directed to include this delivery point in its final tariff filing.

h. *PG&E CT-1 Service*

Section 5.3 of Rate Schedule T-3 provides that if a shipper receives firm transportation service from PG&E under its Rate Schedule CT-1, then that shipper shall be entitled to a reservation charge credit from PGT in certain situations. However,

PGT does not provide reservation charge credits for any other downstream transporters (*e.g.,* Northwest).

The disparate treatment regarding reservation charge credits on downstream pipelines results in an undue rate preference to PG&E and those PGT expansion shippers which ship gas on PG&E over other downstream pipelines and the shippers that ship on gas on the other downstream pipelines. In addition, we are concerned that the Rate Schedule CT-1 reservation charge credit operates as a tying arrangement between interstate and intrastate transportation. Accordingly, we will require PGT to delete section 5.3 from the Rate Schedule T-3 entirely unless such a reservation charge credit becomes applicable to any downstream transportation.

In a similar vein, we note that PGT also provides for a reservation charge credit to all its Malin shippers under its section 5.2 if PGT fails to deliver at Malin 95% of the daily nominations for more than 25 contract days in a year. The record does not reflect whether PGT provides a similar credit to its Stanfield shippers or any other shippers who receive gas at a delivery point other than Malin. To the extent that PGT offers a Malin shipper a reservation charge credit, PGT must also offer the same credit to similarly situated shippers at other delivery points on the PGT system.

i. *Gas Quality*

Revised section 9 provides in part:

> . . . if Shipper delivers *to the upstream pipeline, at Shipper's point(s) of receipt on such pipeline, a quantity of gas of sufficient quality that meets or exceeds that pipeline's gas quality specifications as contained in that pipeline's tariff as approved by the regulatory agency having jurisdiction,* PGT unconditionally agrees to redeliver to *PG&E* at Malin an equivalent quantity of gas, less compressor fuel and line losses as set forth in the upstream pipeline's tariff and in Paragraph 5.6 of this rate schedule, of sufficient quality to meet or exceed PG&E's then current receipt point gas quality specifications. (Emphasis added.)

The tariff language as proposed by PGT places the burden of meeting PGT's gas quality specifications on the upstream pipeline. We have no objection to this revision.

We have, however, one additional comment. To the extent that PGT unconditionally agrees to redeliver to PG&E at Malin delivery point an equivalent quantity of gas specification which will meet or exceed PG&E's gas quality specifications, it must make the same gas quality specification commitment to any upstream or downstream pipeline at any other PGT delivery point.

j. *Commercial Operating Date*

Proposed sections 10.1, 10.2 and 10.3 of Rate Schedule T-3 would link PGT's commercial operation date of the expansion facilities to the dates of expansion facilities of PG&E, its downstream transporter, and Alberta Natural Gas, its upstream transporter, and would tie the PGT expansion in-service date to the in-service dates of its upstream and downstream transporters. The Commission finds these provisions acceptable.

k. *Reservation Charge Relief*

PGT has included a new section 12 of Rate Schedule T-3 in its amendment, which provides the following:

Shipper shall be relieved from its Reservation Charge payment obligation for any period ("Relief Period") when an unforeseeable action, after service commences on the PGT Expansion Project, by the federal or provincial governments of Canada or the United States having jurisdiction ("Event") occurs which: (1) prohibits directly all gas exports or imports through the PGT Expansion Project, or (2) prohibits, through economic means intended to have prohibitory effect, all gas exports or imports from Canada to the U.S. This provision shall only apply, however, if the Event: is equally applicable to all shippers receiving service under this rate schedule subject to such governmental jurisdiction; is not peculiar to the circumstances of a particular Shipper; and is not attributable to the actions or non-actions of any particular Shipper. In order to invoke this provision, Shipper must notify PGT of such Event within four weeks after Shipper becomes aware of such Event. The Relief Period shall commence 12 months after service is curtailed as a result of such Event ("Commencement Date") provided Shipper has resisted such Event by all reasonable means including appeals within the 12-month period whether or not all such appeals have been resolved as of the Commencement Date.

The Commission does not find section 12 objectionable.

2. *Protests to Amendment*

1. *Rates*

i. *Initial Rates Violative of PD Authorization*

Altamont contends that although the January 22, 1991 order provides that PGT's initial rates for service would be based on 1988 cost data in the original application, PGT's amended application simply disregards the Commission's order and substitutes 1993 cost data for the 1988 data. Altamont explains that although PGT was aware that the 1988 data was significantly understated, PGT refused to adjust its rates and conducted its open seasons on the basis of rates reflecting the

1988 costs. Altamont believes that PGT should be precluded from increasing those rates immediately after shippers have signed thirty-year contracts.

The PGT facilities have yet to be constructed and, as such, it is reasonable to conclude that a reasonable shipper would have been aware that the actual costs of the pipeline would have fluctuated over the course of time. Rates seldom are determined once and for all and shippers often agree to adjustments. Moreover, in this proceeding, PGT has not actually filed for a rate increase, because the lower rates were never in effect. PGT has merely amended its application to reflect the updated capital costs of the expansion project. We acknowledge, however, that this will have an effect on the initial rates authorized herein. We note, however, that none of PGT's expansion project shippers has objected to PGT's proposal. In fact, the only objection comes from Altamont, a competitor of PGT. Based upon the foregoing, we reject Altamont's protests.

ii. *The Appropriate Rate Design for the Project*

Amoco presents no arguments or evidence on this issue and in view of this order's granting PGT its requested straight-fixed variable rate design, Amoco's protest is rejected.

3. *Nonrate Issues*

i. *Open Season*

Arguments

In its protest, the Amoco Group states that PGT's amendment raises questions about the discriminatory and anticompetitive nature of PGT's new open season held between February 21, 1991 and March 22, 1991. For example, states the Amoco Group, PGT's bid process which is based on present value calculations is meaningless where PGT's maximum rates (or even a reasonable approximation) were not known.

El Paso also objects to the new open season. It contends that the process utilized in the second open season has skewed

results, similar to those which were found to be discriminatory in the first open season. El Paso argues that all potential California shippers which submitted bids for the expansion capacity north of Malin were directed (as a condition upon such access) to contract with PG&E for expansion project service south of Malin. In particular, states El Paso, all potential shippers were required to ship at a single tariff rate, regardless of ultimate destination—contrary to the Commission's January 22, 1991 requirement.

In its protest, Altamont contends that under the open season procedures filed on February 20, 1991, the proposed tariff prohibits multiple bids.[111] Altamont states that notwithstanding that provision, PGT waived the rule and accepted multiple bids from three preferred customers:

> (1) three bids from North Canadian Oils Limited and two of its subsidiary affiliated companies, North Canadian Marketing Group and North Canadian Resources Inc.;
>
> (2) four bids from PanCanadian Petroleum Ltd. and three of its wholly owned subsidiaries, Blackfoot Pipelines Ltd., PanCanadian Gas Products Ltd., and PanCanadian Kerrobert Pipeline Ltd.; and
>
> (3) Suncor and two of its wholly owned subsidiaries, 333817 Alberta Ltd. and 388022 Alberta Ltd.

Allowing these multiple bids, contends Altamont, provides the affiliated bidders with much more flexibility than other bidders in structuring their bids and permits the affiliated bidders to ensure that they will be awarded as much capacity as they want.

El Paso states that after the Commission's preliminary determination in this order, PG&E filed a pleading with the

---

[111] *See* pro forma Tariff Sheet No. 124P, which provides, "only one bid may be submitted for service between any particular receipt and delivery point. For service between different receipt and delivery point combinations, separate bids must be submitted."

CPUC indicating that the rate structure for the expansion service south of Malin "is *not* altered by FERC's Preliminary Determination. FERC has no jurisdiction over the design of intrastate rates."[112] El Paso states further that according to PG&E "FERC volunteered the thought that there 'should' be Northern California delivery points, but . . . the [California] Commission's decision already authorizes Expansion Project shippers to deliver to Northern California under postage stamp rates . . . [B]ecause FERC's Preliminary Determination may have confused some readers on this point, it is essential that the [California]Commission move decisively to affirm the postage stamp design."[113]

El Paso also informs us that several days before PG&E filed its " Response" with the CPUC, potential expansion shippers received a package concerning the open season ostensibly in which was a letter from PG&E to PGT (dated February 20, 1991) stating that PG&E has no incremental firm take-away capacity from Malin at this time, thus successful bidders in the PGT open season for service to Malin should contract with PG&E for comparable firm capacity for a comparable term. The letter also stated that project shippers should contract for capacity south of Malin by June 1, 1991. Of course, the postage stamp rate will be charged for such service south of Malin regardless of where gas is delivered.

El Paso also believes that the Northern California shippers were once again screened out of the open season because contracts with PG&E were not required to be completed until June 1, 1991. Thus, El Paso believes that the shippers would not be assured of nondiscriminatory access to Northern California markets until after they had become bound to take capacity north of Malin (April 1991). El Paso asks if the agreements for

---

[112] "Response of Pacific Gas and Electric Company to Applications For Rehearing and Modification, 'Application of Pacific Gas and Electric Company,'" Docket No. A.89-04-033 (called PG&E Response) February 26, 1991, pages 9-10.

[113] PG&E Response at 26 n.10, 26-17.

expansion capacity south of Malin are not completed, will the shippers continue to be liable for the capacity north of Malin? Or will they be replaced by shippers in the queue who want to ship to southern California markets? El Paso concludes that the second open season is also discriminatory.

El Paso calls for a new open season with nondiscriminatory access to facilities south of Malin, that the shippers comply with the requirements to file for DOE/FE and NEB authorization and for sale for resale authority, risk conditions to protect consumers if comprehensive market and supply data is unavailable, and that El Paso have access to the confidential materials.

Commission Response

We will not require PGT to implement new open-season procedures. While we interpret the open-season procedures as prohibiting PGT from accepting multiple bids from one bidder, we do not read those procedures as prohibiting PGT from accepting separate bids from a parent shipper and its affiliates, as long as each affiliate (which is a separate entity under law) submits one bid.

Secondly, while we are concerned about the existence of a tying relationship between transportation service north of Malin and transportation service south of Malin (including the postage rate charged for such service), and will address the propriety of such a relationship in a separate section of this order, El Paso does not allege (nor do we perceive) how the administration of the open-season process has cause any potential shipper from gaining undue access to the PGT expansion system or from submitting a bid for as much capacity as it desired.[114] Absent such explanation, we do not view the existence of an affiliate relationship between shippers as sufficient

---

[114] *See, e.g.,* PGT's June 13, 1991 response to the May 29, 1991 motion for disclosure filed by Altamont and to the various pleadings filed by the other project competitors of PGT, at p.5, n.7, where PGT notes that

(footnote continues)

justification to require PGT to establish new open-season procedures. In any event, El Paso does not argue (nor is there evidence to suggest) that the open season was administered in an unfair or otherwise unduly discriminatory manner so as to deny the expansion shippers an equal opportunity to gain a place on the expansion queue.[115] To the contrary, the evidence suggests that the February/March 1991 open season was fairly administered and comports with the purpose of an open season.[116]

Finally, we fail to understand the significance of the Amoco Group's argument that PGT's bid process which is based on present value calculations is meaningless since PGT's maximum rates were not known. Even if the maximum rate

---

(footnote continued)

"every shipper was allowed to submit a bid for as much capacity as it desired." Moreover, no expansion shipper or potential expansion shipper has complained that it was denied access to PGT's expansion capacity.

[115] The bidding process was described in the March 15 order (54 FERC at p. 61,831) as follows:

> PGT states that bidders in the open season are required to submit the following instruments: (1) a fully completed and executed bid form; (2) two executed originals of the service agreement for each completed bid form; (3) creditworthiness documentation consistent with that currently required under section 21.7 of PGT's FERC Gas Tariff, Original Volume No. 1-A; and (4) payment of one month's reservation charge, up to a maximum of $10,000 per bidder, for the quantity bid. The bids will be submitted to and certified by Arthur Andersen & Company.
>
> According to PGT, a shipper may bid for capacity from Kingsgate, British Columbia to north of Malin, Oregon, or from Kingsgate to Malin, or from Stanfield, Oregon to Malin. Thus, there is no tie to intrastate transportation in the revised service agreement and no provision specifically for Pacific Gas & Electric Company (PG&E) in the January 31 filing.

[116] *See, e.g., Trailblazer Pipeline Company,* 55 FERC ¶ 61,050, mimeo, at 21, n.41 (1991), where we stated "[t]he purpose of an open season is to allow shippers that were previously unable to obtain access to transportation to have an equal opportunity to gain a place in the pipeline's queue."

used in its present value calculations is changed by the Commission, such rate change will not disturb the relative priority assigned to potential shippers since (irrespective of the level of maximum rate used by PGT in its present value calculations) present value will be based on a rate which is uniform and equally applicable to all shippers. For these reasons, we will not require PGT to establish new open-season procedures.

In conclusion, we do not believe that any purpose would be served by an additional open season, nor that Northern California shippers have been unduly discriminated against by PGT. We note also that PGT did accept bids from affiliates and believes that this did not violate the multiple bid rule, inasmuch as each affiliate represents a separate bid.

ii. *Supply*

Arguments

In its amendment protest, the Amoco Group contends (without elaboration) that PGT failed to demonstrate supply commitment to support the expansion project. Altamont makes the same argument, stating that: (1) PGT has provided no supply data for fourteen of its new expansion shippers, and (2) other shippers have not negotiated supply contracts with potential suppliers. These inadequacies, states Altamont, warrant a dismissal of PGT's amendment. In the alternative, asserts Altamont, the Commission should require the submission of evidence demonstrating that the shippers have sufficient supplies to support the proposed expansion project. In this connection, states Altamont, Altamont and other interested parties should be given access to the "confidential" data PGT filed with the Commission and should be allowed to conduct discovery with regard to supply issues.[117]

---

[117] Along with its protest, Altamont contemporaneously filed a motion on May 29, 1991, which seeks access to the supply and market data that PGT filed with the Commission under seal.

El Paso states that some shippers intend to rely upon data filed with the Commission as a result of the first open season. However, it states, because that data is now obsolete and not reflective of current supply needs, the showing of supply which might have sufficed for those shippers during the first open season is simply inadequate to justify the results of the second open season. El Paso also states that certain Canadian officials have suggested that the expansion project may have available for export only .179 Tcf of gas supplies annually, in light of other projects which will serve Canadian and U.S. markets. El Paso states that an annual throughput of .179 Tcf is insufficient to justify the expansion project. Moreover, states El Paso, the only showing regarding the terms of supply have demonstrated that substantial take-or-pay requirements may preclude competition for large portions of the California market.[118] Finally, El Paso contends that the Commission should consider recent threats made by provincial authorities in Alberta to restrict or severely condition volumes exported from Alberta for consumption in California in the future. These threats, El Paso argues, may be memorialized in legislation.

Commission Response

As we noted in the January 22, 1991 order in this proceeding, the proposed PGT expansion is a transportation-only project. As such, PGT will not be purchasing or selling any of the gas transported.

---

[118] In its untimely motion to intervene, the Independent Petroleum Association of New Mexico and Panhandle Producers and Royalty Owners Association (IPAN) raise a similar argument. It states that two of PGT's expansion shippers (Edison and San Diego) testified that their Canadian gas supply arrangements, which would require each of them to commit to as much as 70 percent annual take-or-pay obligations, will have the effect of foreclosing future efforts by U.S. suppliers to sell gas in competition with those Canadian supplies, even if the U.S supplier is willing to sell gas on more attractive terms and at a price less than the Canadian prices.

Based upon the most recent estimates of the NEB, the Alberta Energy Resources Conservation Board (AERCB), Energy, Mines & Resources Canada (EM&R), the Alberta Department of Energy, the Alberta Petroleum Marketing Commission, the American Gas Association, and the Canadian Petroleum Association, PGT states that established reserves in the Western Canadian Sedimentary Basin remain at the 70 Tcf level. PGT stated that EM&R's latest analysis ("2020 Vision: Canada's Long Term Energy Outlook" Winter 1990) shows Canada's gas production capability at about 4.5 Tcf per year in 1988, thus reflecting a surplus deliverability of about 1.1 Tcf per year. Additionally, PGT noted that the latest EM&R reference case shows Canadian domestic demand increasing by 1.9 percent per year and exports growing from the current level of about 1.3 Tcf per year to 2.1 Tcf per year in 2001. PGT also noted that despite this tremendous growth in demand, EM&R projects that the deliverability surplus will persist throughout the period to 2020, averaging almost 1 Tcf per year and never falling below 600 Bcf per year.[119]

Notwithstanding evidence tending to establish that there appear to be sufficient supplies of Canadian gas, we continue to be concerned that the expansion shippers may not be able to contract for sufficient supplies to support the project.

Given the incomplete supply arrangements of PGT's shippers, as noted in earlier discussion, we will condition the certificate in this proceeding to provide that PGT bear the responsibility for any shortfall in cost recovery if the import authority ultimately granted by DOE/FE to the shippers (or any shipper) proves to be of shorter duration or a lower volume than that necessary for the recovery of the costs of the facilities proposed herein. PGT shall be prohibited from shifting any of the costs associated with the facilities and services proposed onto any of their other customers.

---

[119] We note that the PGT Expansion volumes would amount to approximately 328.5 Bcf per year, which is only about one third of this surplus of 1 Tcf.

iii. *Tariff Sheets Reflecting a 100-Percent Demand Charge*

The Cities of Burbank, Glendale and Pasadena (the Cities) have not heretofore contested this proceeding and are original and existing shippers on the project. The Cities object to PGT's filing of tariff sheets reflecting the 100% reservation charge and the 14% return on equity proposed by PGT in its earlier application and in its request for rehearing of the Commission's PD in this proceeding. The Cities point out that the Commission specifically rejected PGT's 100% reservation charge and 14% ROE in the Commission's order.[120] The Cities believe that the Commission's policy would be undermined by accepting the tariff sheets containing the rate design and return on equity which PGT would prefer in lieu of what the Commission has already approved. The cities support PGT's application in all other respects.

We find the Cities' argument moot in view of our granting PGT a straight fixed-variable rate design.

VI. Tying/Cross-over

Arguments

Altamont protests PGT's amended application and states that it suffers from several significant deficiencies, as did the original application. Altamont also protests PGT's tariff sheets filed on March 25, 1991. Altamont, Kern River and El Paso believe that PGT has disregarded the Commission's directions to sever the link between the PGT expansion project and the expansion project of its corporate parent, PG&E. Their complaint centers on the claim that PG&E has no intention of offering mileage-based rates and additional delivery points to shippers wishing to deliver interstate gas in Northern California. Altamont notes that potential shippers desiring firm service

---

[120] *Pacific Gas Transmission Company,* 54 FERC ¶ 61,035 (1991), at pp. 61,149 and 61,150-52.

in California would be required to use the PG&E expansion project, would not be allowed to use PG&E's existing pipeline capacity, and would be charged a single postage stamp rate for deliveries anywhere from Malin to Kern River.

Altamont also alleges that if a shipper desires to serve Northern California that shipper must pay the postage stamp rate for deliveries anywhere between Malin and Kern River and then would need to contract for downstream local distribution service from PG&E and thus would also be required to pay another postage stamp rate for deliveries within Northern California, thereby being disadvantaged in competing with PG&E. Altamont states that PG&E has asked the CPUC to require the discriminatory practice which this Commission has prohibited. Altamont requests that the Commission condition any certificate issued to PGT to require mileage-based rates and delivery points in California and by ordering PG&E to establish such rates and delivery points.

In support of its argument, Altamont notes that on April 23, 1991, PG&E requested the CPUC to find and conclude "that the PG&E's Expansion Project is certificated as the intrastate means for taking gas away from the PGT Expansion and that PG&E's existing Line 400 facilities and the intrastate rates related to them will not be available for 'cross-over' from the PGT Expansion."[121] According to Altamont, "cross-over" would effectively provide shippers serving Northern California markets with a means of avoiding the discriminatory rate and tying arrangements that the Commission condemned in its preliminary determination.

Altamont states that certain shippers oppose PG&E's proposal and have noted PG&E's continuing efforts to tie its intrastate transportation to PGT's interstate transportation.

---

[121] Pacific Gas & Electric Company Petition for Modification, CPUC Application No. 89-04033, filed April 23, 1991 ("PG&E Petition") at pp. 6-7.

With respect to PG&E's petition to prohibit "cross- over," the shippers[122] have stated:

> Granting PG&E's petition would also 'tie' intrastate transportation to interstate transportation, in blatant violation of FERC policy on this issue. PG&E's petition would require PGT expansion shippers to use the PG&E expansion for intrastate service, thus tying service on the PGT expansion to a particular intrastate service. Not only did the FERC find that such tying may well be illegal, it explicitly ordered PGT to amend its tariff to eliminate 'the discriminatory language requiring any intrastate transportation.' The CPUC must not now allow PG&E's intrastate tariffs and rules to effectively circumvent the FERC's ruling by prohibiting cross-over.[123]

Response

As for Altamont's allegations concerning the tying arrangement between PGT and PG&E, the Commission notes that PG&E is not jurisdictional to this Commission, pursuant to Section 1(c) of the Natural Gas Act. Accordingly, the Commission cannot dictate PG&E's rates nor condition this certificate to gain jurisdiction that is not provided by the Natural Gas Act.

In the January 22, 1991 order in this proceeding, we found that the service to be offered by PGT and subsequently by its parent company, PG&E, may be illegally tied, in that new shippers receiving service on the PGT Expansion to the Malin, Oregon delivery point must receive service on the PG&E

---

[122] The indicated expansion shippers filing in opposition to PG&E's petition before the CPUC are: North Canadian Oils, Suncor, Norcen Marketing, PanCanadian Petroleum, Petro-Canada, and Chevron. These shippers account for 236 MMcf per day of expansion volumes into California or about one-third of the California volumes.

[123] "Response of the Indicated Expansion Shippers In Opposition To PG&E's Petition For Modification of D. 90-12-119," filed on May 24, 1991 in *Pacific Gas and Electric Co.,* CPUC Docket No. A.89-04-033 ("Response of Indicated Expansion Shippers"), at 4-5.

Expansion from Malin to a single delivery point at Kern River Station. PGT was required in the January 22, 1991 order to revise and remove tariff language which required such joint PGT/PG&E service. The Commission was concerned that the joint PGT/PG&E service was designed to prevent competition in PG&E's northern California service area by forcing shippers who wanted to serve northern California to pay unnecessary transportation charges to PG&E which would prevent fair competition with PG&E.

On June 5, 1991 and June 19, 1991, the CPUC issued two orders which addressed this issue.[124] The CPUC said that shippers on PGT's Expansion could have gas delivered to northern California markets, but that they would have to pay the PG&E expansion transportation rate, an incremental postage-stamp rate based on service to Kern River Station, and an additional CPUC approved rate for intrastate transportation on PG&E's existing facilities. The CPUC stated that the Commission's concerns about market competition were a misconception because shippers could receive service directly to northern California. The CPUC then stated that the Commission's concern about illegal tying does not affect the CPUC's decision concerning the postage stamp rate. The CPUC went on to say that shippers could not "cross-over" to receive service on PG&E's existing system/tariff, even if the shipper or its customer had capacity on PG&E's existing system. The CPUC order requires that all PGT expansion shippers take intrastate capacity on the PG&E expansion. However, the CPUC did leave to a future rate case the possibility of a reduction in the intrastate transportation rate that an expansion shipper serving northern California must pay in addition to the postage stamp rate to Kern River. Thus, the CPUC has firmly tied the PGT expansion with the PG&E expansion and has eliminated any existing or potential brokered capacity on PG&E's existing pipeline from use by PGT expansion shippers.

---

[124] Decision No. 91-06-017 issued on June 5, 1991 and Decision No. 91-06-053 issued on June 19, 1991.

We believe that the CPUC's conclusions may be based upon a misinterpretation of our January 22, 1991 order in this proceeding. The CPUC states that:

> Apparently the FERC interprets the tariff for a "single delivery point" as prohibiting delivery of Expansion gas anywhere other than Kern River Station. If PG&E Expansion service is required for PGT Expansion shippers wishing to bring gas into California, then, according to this interpretation [the FERC's] the interstate shipments cannot be received anywhere else besides Kern River Station. According to the intervenors, this routing of PGT gas to the [PG&E] Expansion project becomes a "tying arrangement" because it would prevent expansion gas from being delivered to northern California, thus protecting PG&E's market from competition.
>
> No unlawful tying arrangement will result from requiring PGT expansion gas to be transported within California under the PG&E Expansion Project tariff. That misconception is based on a presumed lack of delivery to points within PG&E's service territory. [Emphasis Added.][125]

The Commission did not interpret this tying arrangement between interstate and intrastate transportation to be simply the exclusion of delivery points in northern California. Apparently, the CPUC misunderstands that the Commission construed several aspects of the situation as tying arrangements:

> 1. the fact that originally shippers on the expansion signed one contract with PGT/PG&E for service from the Canadian border to Kern River Station (this has now changed);
>
> 2. the fact that originally shippers who wanted deliveries in northern California had to pay for service to Kern River Station whether the physical delivery was made or not, and then had to pay again for delivery (and even arrange for

---

[125] CPUC Decision 91-06-053 issued June 19, 1991 at page 7.

delivery) in northern California on the existing PG&E facilities (this has not changed).

Thus, in addressing our concerns, we stated in the January 22, 1991 order that "there should be rates and additional delivery points available for shippers who desire some portion or all of their volumes to be delivered in Northern California before the gas reaches Kern River Station." Our concern was with more than the presence of physical delivery points. We also stated that "we object to PGT's requirement for its California shippers that the expansion volumes must be transported down the state to Kern River Station, where the customers in Northern California will then be forced, not only to pay for the unnecessary haul to Bakersfield, California, but also to arrange for and pay for transportation back up the state on PG&E's intrastate pipeline system." Finally, we noted that "the Northern California customers could simply pay for the unnecessary transportation and physically receive the gas at a more convenient Northern California point." With this statement we attempted to convey that we understood that physical delivery at Bakersfield was not particularly a requirement. In addition, we wanted to convey that "we are concerned about the possibility that PGT's price proposal may be an illegal tying arrangement between interstate and intrastate transportation."

From the above, it becomes obvious that the Commission determined the tying arrangement to be more than the simple requirement of deliveries at Kern River Station. However, operating on this misconception, the CPUC has now furthered the tying arrangement by requiring that expansion shippers on PGT must also use the PG&E expansion. In its Decision 91-06-017 issued June 5, 1991, the CPUC states: "Expansion shippers may require PG&E to deliver gas at any point along the expansion. There is, however, a single transportation rate based on the cost of service to Kern River Station. The FERC decision does not affect our decision approving a 'postage stamp rate', or in other words, a single rate for transportation on the Expansion Project [PG&E]." The CPUC explains in its decision that "the primary purpose of the [PG&E] Expansion

Project is to provide firm transportation of natural gas to the southern California market. Eighty percent of the volumes subject to precedent agreements is destined for southern California. . . . Rates based on the cost of facilities needed to deliver gas to northern California would allow northern California shippers to use the [PG&E] Expansion while avoiding the full cost of facilities built to accomplish the primary function of the [PG&E] Expansion."[126] That primary function is, of course, as stated above, to serve southern California. The CPUC further states: "We have already determined that the interests of all ratepayers in this state would be served by allocating efficiencies of scale and scope to incremental users of natural gas in southern California. To the extent southern California shippers receive any benefits from shipments destined for northern California [due to overpayment by northern California shippers], we find that such benefits are supported by public policy promoting economic development of the state as a whole."

We believe that the CPUC's conclusion that the primary purpose of PG&E's Expansion project is to serve southern California is certainly within the jurisdiction of the CPUC. However, this position is in contrast to that of the FERC which views the PGT Expansion project as benefiting the State of California as a whole. The FERC does not view PG&E's expansion as serving southern California primarily and, in accordance with the Commission's policy on nondiscriminatory access, would view this action without favor.

While the CPUC treats the Commission's views on this issue as an apparent misconception, the Commission believes there is a fundamental difference in policy concerning open competition between the Commission and the CPUC. The Kern River/Mojave project and the WyCal Pipeline Project for

---

[126] The CPUC also found that "delivery to northern California over the Expansion would not be possible without the operation of the expansion facilities at the southern end of PG&E's system," thus, all PG&E's Expansion shippers should pay the fully allocated costs of the PG&E Expansion regardless of the actual point of delivery.

new interstate transportation service, (i.e., LDC by-pass) into California were approved by the Commission over the strong objections of the CPUC. In this case, the CPUC has thus far used the interstate, intrastate composition of PGT/PG&E to prevent the open interstate transportation competition which it had unsuccessfully fought against in the Kern River/Mojave and WyCal cases.

We have an interstate system here and we are still willing to respect PG&E's status as a Hinshaw pipeline. However, we are concerned that the PGT shippers will not be able to use PGT freely. In this regard, we believe that the interstate jurisdiction is frustrated by the discriminatory arrangement that PGT and PG&E possess. Under the circumstances, we cannot find the public convenience and necessity served until the anticompetitive nature of the tying arrangement is eradicated. Thus, PGT may not initiate construction until the Commission is assured that the PGT shippers are receiving nondiscriminatory treatment as to access to the California markets by means other than on the PG&E expansion. Within 20 days after issuance of this order, PGT shall file information with the Commission evidencing that all discriminatory practices relating to PGT shipper access to California markets has been eliminated. Interested parties shall have 10 days to respond. The Commission will act within 30 days of these filings. We emphasize here that our finding of public convenience and necessity is premised on PGT's acceptance of this condition; without this condition, we could make no public convenience and necessity finding.

In this context, however, we note that our consideration of the public policies underlying the nation's antitrust laws does not mean that a proposal which may raise some antitrust concerns could not be found overall to be in the public convenience and necessity. Our obligation is to weigh all such claims,

together with all relevant factors, in exercising our responsibilities[127] under the NGA.[128]

VII. Markets and Supply

Altamont believes that PGT has failed to provide adequate supply and market data to support the application. Altamont believes that since the data is incomplete (some shippers have not provided supply or end-use data), this alone requires rejection of PGT's application given the Commission's past insistence that traditional applications be complete. Altamont also requests access to the confidential market data filed by PGT and to be allowed to conduct discovery with regard to supply issues. Some of the shippers which Altamont states have not provided data have actually provided data but confidentially only; however, Altamont is correct about four of the shippers which have supplied no market data.

El Paso also believes that there is a dearth of market data provided as a result of the new open season relating to the new shippers. El Paso's comment that Cascade is receiving more capacity as a result of the second open season is erroneous; Cascade, in fact, receives less capacity. Natgas is the only shipper receiving more as a result of the new open season (Natgas went from 50 MMcf/d to 58.8 MMMBtu/d). El Paso questions whether the DOE/FE import authorizations will support the project and notes that the export authorization applications with the NEB are practically nonexistent. El Paso states that IGI's long-term export authority does not relate to the expansion volumes. El Paso believes that since the shippers have been on notice for a year (in its May 1, 1990 order the

---

[127] *Pacific Power & Light Company et al.*, 25 FERC ¶ 61,052 (1983).

[128] The National Energy Board of Canada (NEB) has decided to seek comments from interested parties on an application from the Canadian Petroleum Association (CPA) to review the board's decision to extend a gas export license which allows Alberta and Southern Gas Co. Ltd. to export natural gas to Pacific Gas and Electric Company in Northern California.

Commission directed all importers of Canadian gas to file for section 3 import authorization from DOE/FE) that the project should be dismissed with respect to shippers who have neither applied for nor received long-term authorization. El Paso also believes that dismissal is warranted for all shippers who have not yet filed with the NEB. El Paso also requests authority to review confidential data.

Deficiencies in the market data listed by Altamont and El Paso are similar to those noted earlier in this order. To that extent, we are therefore in agreement with many of Altamont's observations about PGT's market data. However, we do not believe that allowing Altamont to review PGT's confidential data would help this situation since we have reviewed this confidential data. Under the circumstances, we see no need to divulge PGT's customer data in order to resolve the issues presented here.

Concerning Altamont's comments on SoCal Ed's market, we note that SoCal's original market report, in which SoCal Ed was reviewed, we found that SoCal Ed would be using its expansion volumes to displace current intrastate pipeline (LDC) purchases. Data for SoCal Ed, however, does not show growth in its market. Altamont states that SoCal Ed and other shippers do not appear to need new capacity and that the new capacity would be used to displace capacity on existing pipelines. This is exactly what we also found in its original market report in this proceeding. Therefore, in this regard, Altamont has raised nothing new. In addition, Altamont states that the market data does not indicate whether certain of the shippers that are not end-users or LDCs have executed sales contracts or even begun negotiations. First, we note that sales contracts were not provided by these new shippers. It is thus possible that these shippers do not yet have sales contracts and are only in negotiations at best. This circumstance was the basis for our concern expressed above in the market section of this order, and we believe that our discussion and resolution of the market expressed above adequately resolves the issues raised here.

VIII. Miscellaneous Issues

Altamont listed other areas of deficiencies:

(1) PGT failed to modify tariff provisions governing payment of reservation charges as ordered by the Commission.

(2) PGT failed to comply with the Commission's order respecting capacity brokering.

As for the tariff provisions noted above and in Altamont's pleading, these issues have been addressed above, and we find them rendered moot by the changes to PGT's tariff that we have required. In this connection, capacity brokering is also discussed in the tariff section of this order.

IX. CPUC Decision (D.90-12-119)

Kern River notes that PG&E has received its certificate from the CPUC (D.90-12-119, December 27, 1990) to construct the downstream facilities for PGT's expansion. However, Kern River also notes that the CPUC has recently stayed its decision issuing a certificate to the downstream project (PG&E) because of concerns raised by the California Attorney General and others that the decision did not meet the requirements of California's environmental laws. Kern River states that ultimate approval of this project (PG&E's) is now open to serious questions and should not be the basis for approving the upstream project (PGT). Kern River recommends that the Commission place PGT at risk for any of its capacity that is undersubscribed as a result of failure of PG&E's downstream project, just as the Commission has done in the past for upstream facilities.

We agree that PGT and its shippers should be solely at risk for adequate downstream capacity. Part of our consideration of PGT's overall project has in fact been based on the analysis of downstream takeaway capacity. The National Environmental Policy Act (NEPA)[129] requires such an analysis. However, the Commission notes that this should in no way limit downstream transportation to only the facilities analyzed. Downstream capacity could be available, or could become available on existing downstream facilities (See the "Tying/Crossover" discussion above in this order).

X. Sales for resale

Finally, some of the shippers will be making sales for resale, El Paso believes that these volumes are not under CPUC jurisdiction, and therefore the exemption from federal regulation afforded by the Hinshaw Amendment cannot apply to facilities and services which are associated with the proposed sale for resale in interstate commerce. El Paso calls for the Commission to compel all shippers contemplating sales for resale to file for such authorization and assess the regulatory status of facilities south of Malin based thereon.

The Commission acknowledges that problems exist with this application concerning import and export authority, as well as the PGT shippers' markets. In light of the foregoing, we will condition the certificate issued herein on the receipt of sale for resale authority of all parties which require it.

XI. Conclusion

All parties having had an opportunity to present facts and advance arguments on the issues raised by the applications in these proceedings, and after examination of the record developed in these proceedings with respect to all environmental and nonenvironmental issues, the Commission has completed its

---

[129] 42 U.S.C.A. § 4321 *et seq.* (1969).

phased review of PGT's certificate application, as amended on May 10, 1991, and concludes that the proposal to operate and construct new expansion facilities, as modified herein, is required by the public convenience and necessity and satisfies the requirements for issuance of a section 7(c) certificate under the Commission's regulations. The instant order incorporates the findings with respect to the nonenvironmental issues contained in the January 22, 1991 order, except to the extent they are modified on rehearing herein, and constitutes the Commission's final decision on PGT's request for section 7(c) expansion authorization and its companion requests for NGA section 3 authority and a Presidential Permit.

At a hearing held on July 31, 1991, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the applications and exhibits thereto, submitted in support of the authorizations sought herein, and in consideration thereof,

The Commission orders:

(A) A section 7(c) certificate of public convenience and necessity is issued in Docket No. CP89-460-000 *et al.*, authorizing PGT to construct and operate the expansion facilities as described more fully in the body of the Commission's orders in this proceeding and in PGT's application, as subsequently amended.

(B) A certificate of public convenience and necessity is issued authorizing PGT to provide firm transportation service for the various expansion shippers, all as more fully described herein and in the application, as amended, in Docket No. CP89-46-000.

(C) Pursuant to its authority under section 3 of the NGA and Delegation Order No. 0204-112, and under Executive Order Nos. 10485 and 12038, NGA section 3 authorization and a Presidential Permit for the siting, construction, operation and maintenance of the proposed facilities at the United States-

Canada border is approved as requested in Docket No. CP90-1-000.

(D) PGT shall be required to file revised pro forma tariff sheets, as discussed herein, within 30 days after issuance of this order.

(E) The revised tariff sheets required by Ordering Paragraph (D) above must reflect the rates set forth in the preliminary determination and this order.

(F) The Certificate issued in Ordering Paragraph (A) above is conditioned upon PGT's compliance with Part 154 and paragraphs (a), (c)(1), (c)(3), (c)(4) and (e) of section 157.20 of the Commission's regulations, and with the environmental mitigation measures and conditions contained in Appendix C of this order.

(G) The authorizations granted herein are subject to the terms and conditions contained in the Commission's January 22, 1991 order in this proceeding, except to the extent that the January 22, 1991 order is modified herein.

(H) PGT is not authorized to begin construction of the facilities certificated in Ordering Paragraph (A) above until the Commission's Director of the Office of Pipeline and Producer Regulation has certified in writing that construction can commence.

(I) The late motions to intervene are granted.

(J) The requests for an evidentiary hearing are denied.

(K) The remaining procedural motions are granted and denied as discussed in this order.

(L) Upon acceptance of a certificate in this proceeding, PGT shall charge the rates recommended above for service through the proposed expansion project facilities, and these rates should be subject to adjustment to reflect the straight fixed-variable rate design approved in this proceeding. The rates approved herein are initial rates under section 7 of the

Natural Gas Act, and our approval does not constitute approval of any underlying rate methodology, principle or concept to be used in any general rate change filed pursuant to section 4 of the Natural Gas Act. These initial rates will remain in effect until such time as PGT files to change the rates in a section 4 proceeding. At that time, any party or the Commission's staff may propose new rates based on different methodologies, principles or concepts.

(M) As discussed herein, PGT may not initiate construction until the Commission is assured that the PGT shippers are receiving nondiscriminatory treatment as to access to the California markets by means other than on the PG&E expansion.

(N) PGT shall complete construction and place in service the facilities authorized herein within 1 year from the date PGT obtains approval from the Commission that condition (M) of this order has been satisfied.

Appendix A

PGT Expansion Project
New and Old Shipper List [California Shippers]

Old Shippers *Kingsgate to Kern River*	*MMcf/d*
Am Hunter	50
Bonneville	4
BP Gas	21
Burbank	5
Glendale	5
Pasadena	5
Natgas	50
NCM	50
PG&E	100
Panc Oil	5
Salmon Res	50
SDG&E	100
SoCal Ed	200
Suncor	50
Total from Kingsgate:	695

Final Shipper *Kingsgate to Main*	*MMMBtu/d*
——	
——	
——	
Burbank	4.7
Glendale	4.0
Pasadena	4.0
Natgas	58.8
North Canadian Mkt	19.6
——	
Pancontinental Oil	4.0
Salmon Res	27.4
SDG&E	52.5
SoCal Ed	201.7
Suncor	40.4
Total Kingsgate:	417.1
New Shippers	
CanWest Supply	27.4
Chevron USA	31.3
DeKalb Energy	11.8
Norcen Mkting	47.0
NC Oils Ltd	39.2
NCalif Power	5.5
Northridge Alberta	8.1
PanCanadian Petrol	40.3
Paramount Resources	19.6
PetroCanada Hydroc	19.6
Sacramento MUD	12.1
Vector Energy	16.7
Wash Energy Expl	19.6

Old Shippers Kingsgate to Kern River	*MMcf/d*
Stanfield to Kern River	
BP Resources	10
Williams Gas Mkting	50
Total Stanfield:	60

Pacific Northwest Shippers Original Shippers	*(MMcf/d)*
Wash Water Power .	45
Cascade	30
IGI Resources	33
Northwest Natural .	40
Total	148

Final Shipper Kingsgate to Main	*MMMBtu/d*
Total New Shippers from Kingsgate to Malin:	298.2
Total New and Old Shippers from Kingsgate to Malin:	715.3
Stanfield to Malin	
BP Resources	10.25
CanWest Supply USA	35.00
CanWest Gas Supply	16.52
Total New Shippers Stanfield to Malin:	61.77
Total Calif Volume: .	777.07

New Pacific Northwest Shippers	*(MMMBtu/d)*
Wash Water Power .	42.42
Cascade	3.73
IGI Resources	7.16
Northwest Nat	38.28
Subtotal:	91.59
Chevron USA	20.00
Washington Energy .	35.34
Exploration CP National	2.31
Subtotal:	57.65
Total Pacific NW: . .	149.24

Appendix B

Pacific Gas Transmission Company
Docket No. CP89-460-007
Motions to Intervene

Altamont Gas Transmission Company[1]
Amoco Production Company and Amoco Canada Petroleum Company Ltd.[1]
BP Gas Marketing Co.[2]
the Cities of Burbank, Glendale, and Pasadena[1]
CanWest Gas Supply U.S.A., Inc. and CanWest Gas Supply Inc.[3]
Dekalb Energy Company
El Paso Natural Gas Company[1]
Kern River Gas Transmission Company[1]
Norcen Marketing Inc.
Northwest Natural Gas Company[3]
PanCanadian Petroleum Company
Pancontinental Oil Ltd.
Paramount Resources Ltd. and Paramount Resources U.S. Inc
Petro-Canada Hydrocarbons Inc.
Southern California Edison Company
Southern California Gas Company and Pacific Interstate Transmission Company
Washington Energy Exploration Inc.

Motion for Leave to File Out of Time

Altamont Gas Transmission Company
Kern River Gas Transmission Company
Independent Petroleum Association of New Mexico

---

[1] Protest.

[2] BP Gas Marketing (BP Gas) has decided to withdraw from the PGT project as a result of having to re-bid for capacity in the new open season. BP Gas withdraws its motion in Docket No. CP89-460-000 and terminates its participation in this proceeding.

[3] In support of the project.

Panhandle Producers and Royalty Association
Sacramento Municipal Utility District

Appendix C

Environmental Mitigation Measures for the
PGT/PG&E Project

To mitigate the environmental impact associated with the construction and operation of the PGT/PG&E Project, the following mitigation measures are included as specific conditions to this certificate:

1. PGT shall adhere to the construction procedures and mitigation measures described in its application, as supplemented, and in its responses to the FERC staff's data requests, except as otherwise modified by these certificate conditions.

2. PGT shall file with the Secretary of the Commission, prior to construction, detailed alignment sheets at a scale not smaller than 1:12,000. All staging areas, access roads, and other areas that would be used or disturbed shall be identified. Any alterations to the route or aboveground facility locations shown on these alignment sheets, other than minor field realignments per landowner needs and requirements, shall be clearly identified and must be filed with the Secretary of the Commission and approved by the Director of OPPR prior to implementation.

Such alterations shall include, but not be limited to, all route changes resulting from implementation of cultural resource mitigation measures; endangered, threatened, or special concern species mitigation measures; geologic/geotechnical mitigation measures; further route modifications that may be recommended by state regulatory authorities; and those agreed to for individual landowners that also affect adjacent parcels of property.

3. Within 30 days of the issuance of a certificate, PGT shall file a specific implementation plan with the Secretary of the

Commission describing how the mitigation measures identified in this Appendix would be implemented. The plan must identify dates for 1) the completion of cultural resource requirements and other required surveys, 2) the start of construction, and 3) the start and completion of restoration. Thereafter, PGT shall file monthly progress reports with the Secretary of the Commission detailing the status of mitigation measure implementation.

4. PGT shall shall implement the "Stream and Wetland Construction and Mitigation Procedures" contained in Appendix C-3 of the Final EIS when constructing across flowing streams, rivers, and wetlands; and shall implement the "Erosion Control, Revegetation, and Maintenance Plan" contained in Appendix B-1 of the Final EIS for all other disturbed areas. Any deviation from these procedures must be reported to and approved by the Commission environmental staff at least two weeks prior to implementation. Any deviation that the staff determines to be significant cannot be implemented without the prior written approval of the Director of OPPR.

5. PGT shall implement the Stream and Wetland Construction and Mitigation Procedures contained in Appendix C-3 of the Final EIS when constructing across riparian areas, and shall locate all staging areas outside of riparian areas. In addition, PGT shall develop, in conjunction with the appropriate state and federal land managing agencies, site-specific revegetation plans for all riparian areas, and shall file these plans with the Secretary of the Commission for staff review prior to construction.

6. Prior to commencing pipeline construction, PGT shall prepare and file with the Secretary of the Commission for staff review a proposed groundwater monitoring plan designed to provide a program for site-specific identification of community and private water supply wells and springs located within 100 feet of the proposed pipeline. The plan shall also provide for documentation of pre- and post-construction well and spring water quality and yields, and should be of adequate detail to

determine with relative certainty whether the pipeline construction was responsible for any adverse impact on the groundwater user. In the event that private wells or springs identified as a result of the groundwater monitoring program are damaged by pipeline construction activities, PGT shall provide an emergency source of potable water and shall restore the system to its original capacity.

7. Prior to commencing construction, PGT, in consultation with the appropriate state agencies, shall prepare and file with the Secretary of the Commission for staff review a project-specific Spill Prevention, Containment, and Control Plan which describes the preventive and mitigative measures to be employed to minimize the impact associated with such occurrences. These measures should include but not be limited to: requiring all fueling and lubrication to be done in areas designated for such purposes, with such areas to be located away from all waterbodies; requiring each construction crew to have on-hand sufficient supplies of absorbent and barrier materials to allow the rapid recovery of any spills; and development of standing procedures regarding excavation and off- site disposal of any soil materials contaminated by spillage.

8. PGT shall not conduct refueling activities or store hazardous material within any designated well protection area(s) or within 200 feet of any private, municipal or community water supply well.

9. PGT shall conduct chemical testing of subsurface and surficial sediments at all waterbody crossings known to be contaminated, or suspected to be contaminated, with hazardous substances. Test parameters shall include priority pollutant metals and organics. The results of such testing shall be filed with the Secretary of the Commission for staff review, with the U.S. Army Corps of Engineers, and with the appropriate state water quality management agencies, prior to construction at these locations.

10. PGT shall control its hydrostatic test water withdrawal rates to ensure that no more than 10 percent of the actual streamflow is withdrawn during hydrostatic testing.

11. PGT shall install appropriate warning signs upstream of major river crossings and print a notice of the upcoming river crossing schedule in a local newspaper(s) for general distribution. This should be referenced in the site- specific plans required for all major river crossings by our staff's Stream and Wetland Construction and Mitigation Procedures.

12. PGT shall survey its proposed route for the presence of nesting raptors prior to construction, realign its proposed route as necessary to avoid the destruction of active raptor nests, and not construct within 0.5 mile of an active raptor nest during the raptor's breeding and nesting season.

13. PGT shall file with the Secretary of the Commission, for staff review prior to construction, a visual resource protection plan that specifies detailed measures that will be implemented to minimize the visual impacts of aboveground facilities as described in Chapter 4L of the Final EIS. For facilities located on federally administered property, these visual resource protection plans must be submitted to the appropriate federal land management agency for review and approval prior to construction.

14. PGT shall sponsor/coordinate the use of buses or car/van pools to reduce personal vehicle use between worker accommodations and central staging/marshaling areas to the maximum degree practicable.

15. PGT shall use buses, vans, or other appropriate vehicles to ferry workers from a central staging or access area to the daily job-site. This measure shall be implemented to the maximum extent practicable.

16. PGT shall provide site-specific environmental information, for all domestic gathering and delivery facilities, at such time as the precise location of these facilities become known.

This information shall be filed with the Secretary of the Commission for review and approval by the Director of OPPR prior to construction. This information shall also be submitted concurrently to the other appropriate federal and state agencies responsible for specific resource management and/or protection to ensure effective and efficient agency/applicant coordination.

17. PGT shall perform an intensive field survey on federal land where potential impact on paleontologic resources is considered by the land administering agency to be high. This field survey should be designed to identify and evaluate specific paleontologic resources. Where feasible, the pipeline shall be relocated to avoid known paleontologic resources where these resources have been determined by detailed scientific investigation to be unique within a particular geologic rock unit or formation (*e.g.,* a vertebrate faunal or paleobotanical floral quarry site). Paleontologic resources with significant values that lie solely in the scientific data contained in the deposit may be excavated under a data recovery plan. Implementation of this mitigation measure shall be developed in consultation with appropriate scientific researchers and appropriate federal agency.

18. PGT shall consult with authorities from the appropriate federal land managing agencies to determine criteria and recommendations for construction, restoration and maintenance within federally administered property. In the event that these recommendations differ from the criteria established in this EIS, the applicant shall implement the criteria and recommendations for restoration established by the appropriate land management agency on federally managed property.

19. PGT shall develop and file with the Secretary of the Commission for staff review prior to construction, a detailed, site-specific construction, restoration, and monitoring plan for its proposed construction across the landslide area present at MP 9.6 of the John Day Variation.

20. Where PGT cannot gather sufficient seed to implement its proposed native straw seeding technique, or where the native

straw seeding technique will not be employed, PGT shall utilize the seeding mixes contained in Appendix B-2 of the Final EIS to revegetate all uncultivated, nonwetland areas disturbed by construction.

21. PGT shall consult with the appropriate Soil Conservation Service, Bureau of Land Management, or Forest Service officials depending on jurisdiction, to determine the optimal timing for planting the recommended seed mixes contained in Appendix B-2 of the Final EIS, and shall conduct seeding operations according to these recommendations.

22. PGT shall develop and implement, in consultation with the appropriate federal, state and/or local agencies, a plan for the control of noxious weeds on all areas disturbed by construction.

23. PGT shall develop, in coordination with the Nature Conservancy, a site- specific construction and restoration plan that would minimize disturbance to the Nature Conservancy's Lindsay Prairie Preserve (MP 307.1 to 307.6) and ensure that native prairie communities located within this area become reestablished on the construction right-of-way.

24. When conducting restoration activities in Idaho, PGT shall consult with the Soil Conservation Service and/or Forest Service to determine appropriate fertilizer mixes and application rates.

25. When conducting restoration activities in Oregon in areas which contain volcanic rock intrusions, PGT shall not dispose of rock that is displaced during pipeline installation by scattering it on the right-of-way unless the affected landowner or land-managing agency expressly grants permission to do so.

26. PGT shall identify prior to construction, in consultation with the Soil Conservation Service (SCS) and affected landowners, all lands which are part of the U.S. Department of Agriculture's Conservation Reserve Program (CRP). On CRP lands, PGT shall document the existing vegetative cover (in terms of species composition, stage of development, and percent cover)

and shall be responsible for restoring all areas disturbed during construction to their pre-construction vegetative cover condition.

27. PGT shall consult with federal and state agriculture agencies, and affected landowners, to identify areas where infestations of nematodes currently threaten existing agricultural production. In these areas, PGT shall obtain detailed instructions from the parties consulted concerning accepted practices which avoid the transfer of nematodes from infested areas to noninfested areas, and shall implement these practices.

28. In its application of herbicides and other practices for the management of unwanted vegetation, or its implementation of routine right-of-way vegetation maintenance procedures, PGT shall conform to the Vegetative Management Environmental Impact Statement and the Mediated Agreement by the Regional Forester, Region 6, U.S. Forest Service, when constructing or operating on public lands administered by the Winema, Ochoco, or Deschutes National Forests.

29. PGT shall replace the streambed armoring substrate after constructing across Bussard and Snyder Creeks, and shall perform long-term monitoring at these locations to ensure that downcutting erosion is controlled.

30. PGT shall not construct within 500 feet of: (a) an active pygmy rabbit burrow during the breeding and rearing season; (b) an active kit fox den during the rearing season; or (c) a Washington ground squirrel colony when the squirrels are estivating.

31. PGT shall not construct within occupied long-billed curlew nesting habitat in the state of Washington during the nesting season.

32. PGT shall not construct within active mule deer, pronghorn, or white- tailed deer fawning areas during the fawning season, or within the John Day Canyon during the bighorn sheep lambing season.

33. PGT shall not construct within the mule deer migration corridors located between MPs 412 to 413, 426 to 427, 474 to 475, 479 to 480, 482 to 484, and 485 to 486 during the mule deer migration season, or within the Rimrock Springs WMA pronghorn migration corridor during the pronghorn migration season.

34. PGT shall survey the upland sandpiper nesting habitat present between MP 104 to 106.8 prior to construction, and shall not construct within this area between May 1 to September 1 if nesting upland sandpipers are found to occupy the area.

35. PGT shall not construct its proposed facilities until:

(a) the Commission staff completes its Formal Consultation with the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS);

(b) the Commission staff receives a Biological Opinion from both the USFWS and NMFS on the PGT/PG&E Project;

(c) PGT develops, and ensures that PG&E develops, a Threatened and Endangered Species Mitigation Plan that is acceptable to the Commission staff, USFWS, and NMFS, and which includes at a minimum any mandatory Terms and Conditions contained in the USFWS's and NMFS's Biological Opinions; and

(d) the Director of OPPR certifies in writing that construction of the PGT's facilities may commence.

36. To ensure that construction of the PGT/PG&E Project does not affect nesting peregrine falcons, PGT shall not construct, and shall ensure that PG&E does not construct, within 0.5 mile or "line of sight", whichever distance is greater, of an active peregrine falcon nest between February 1 to July 31 of any year.

37. PGT shall implement its proposed "Moyie River Pipeline Crossings: Construction, Mitigation, and Restoration Plan" (Plan), which is contained in Appendix F-1 of the Final EIS. In

the event that a landowner refuses to grant PGT access to install a fishery enhancement structure at a location identified in the Plan, PGT shall install the structure in an alternate location which provides an equivalent level of benefit to fish habitat in the Moyie River.

38. PGT shall develop a site-specific construction and restoration plan for its proposed crossing of Willow Creek (MP 421) that is acceptable to the Forest Service.

39. PGT shall develop as part of its site-specific construction plan for the proposed Walla Walla River crossing, in coordination with the applicable Washington state agencies, a timing schedule that would ensure that construction activities do not interfere with anadromous fish passage.

40. PGT shall develop a *detailed site-specific* construction and restoration plan for the John Day Canyon Variation that addresses erosion control, river crossing techniques, exact crossing location, right-of-way restoration, and provisions for avoiding impact on anadromous fish populations, and shall file the plan with the Secretary of the Commission for the review and approval of the Director of OPPR prior to construction.

41. For all locations where occupied residences are located within 50 feet of the working side of PGT's existing right-of-way, as detailed in Table 3D-4 of this EIS, PGT shall confine all construction activities to the existing right- of-way and shall not utilize any additional temporary workspace. To further mitigate disturbance, PGT shall utilize the following techniques in the vicinity of these residences:

(a) dragline or stovepipe construction to minimize the length of open trench;

(b) minimize the period of time the trench remains open; and

(c) fence any trench or bore pits left open overnight.

42. To ensure that PGT's noise design criteria would be achieved, PGT shall file with the Secretary of the Commission

for review and approval by the Director of OPPR, a noise analysis with the Commission for its proposed compressor additions at each existing compressor station prior to construction. Such analyses must be based on far-field sound level data (from either the manufacturer or a similar unit in service elsewhere) for the actual gas-turbine compressor unit proposed for each site with the final noise control design, and include the gas cooling equipment proposed for Compressor Station No. 3.

43. PGT shall install an improved air intake silencer on the existing compressor unit located at Compressor Station No. 3 in order to reduce or eliminate the "pure tone" high-frequency noise emanating from this unit. The noise controls for the proposed turbine compressor and gas cooling equipment shall be designed such that the total Ldn of the existing and proposed units would not exceed an Ldn of 55 dBA at the nearest noise-sensitive area when operating at full load.

44. PGT shall not utilize the historic Meadow Creek townsite, which is considered to be eligible for inclusion in the NRHP by the Idaho SHPO, as a pipeline unloading area, laydown area, or storage yard, nor shall it conduct any earth disturbing activities at this site.

45. PGT shall design a cultural resource management plan for its jurisdictional facilities, as well as for PG&E's related nonjurisdictional facilities, in consultation with the FERC, the SHPOs, and other appropriate agencies including, on federal lands, the BLM and the Forest Service, as necessary. The management plan would outline procedures and methods to identify, evaluate, and protect (i.e., through avoidance or data recovery) *National Register of Historic Places (National Register)* listed and eligible properties which would be affected by the construction of either PGT's jurisdictional facilities or PG&E's related nonjurisdictional facilities. Appropriate questions shall be included in the plan, although others may develop as the field investigation studies proceed. Guidelines for mitigation of impacts to resources that are not avoidable shall be included in the cultural resource management plan.

Prior to project construction, PGT shall design and conduct an intensive cultural resource survey, that is equivalent to a BLM Class III pedestrian survey, of both its final pipeline route and ancillary facilities and PG&E's final route and ancillary facilities. This survey shall be done in consultation with appropriate Native American groups to help identify resources of traditional Native American value.

Upon completion of the field surveys, PGT shall identify for the FERC, the SHPOs, and other appropriate agencies all cultural properties potentially affected by the undertaking, and how each property addresses either the research questions in the management plan and the June 22, 1990 Technical Proposal, or other *National Register* criteria of eligibility, and the applicant's opinion of the effect of the project on any properties. Once properties are properly identified and recorded, the FERC staff, in consultation with the SHPOs and other appropriate agencies, shall identify *National Register* properties by applying the *National Register* criteria of eligibility in light of the research questions developed for the management plan and the Technical Proposal, new research questions inherent in the data, or other criteria under 36 C.F.R. §60.4. Additional information concerning the resources shall be obtained by PGT, if required by the FERC staff, to apply those criteria.

Cultural resources determined eligible for inclusion in the *National Register* by the FERC or other authorizing agencies would then be evaluated as to the impacts of the project. A determination of effect shall be made by the FERC staff in consultation with the appropriate SHPOs pursuant to 36 C.F.R. Part 800.5. Indicators for determining the potential effect of construction on cultural resources are set forth in the ACHP regulations at 36 C.F.R. Part 800.9.

In all cases where cultural resources in or eligible for listing in the NRHP are found within the project area, PGT will avoid where possible, or ensure that PG&E avoids where possible, these resources. Any modifications, including route realignments by either PGT or PG&E, shall be filed with the Secretary

of the Commission for review and approval by the Director of the OPPR prior to construction. When it is impossible to avoid NRHP-listed or eligible cultural resources, PGT will conduct data recovery prior to site disturbance and will ensure that PG&E does the same.

If it is determined that effects upon *National Register* or eligible properties would occur as a result of the project, a mitigation plan to reduce or eliminate these effects shall then be formulated and submitted to the FERC, the SHPOs, and other appropriate agencies. The FERC shall afford the ACHP an opportunity to comment on the effects of the project and the proposed mitigation plans. Site-specific mitigation plans shall be formulated in accordance with the appropriate provisions of the management plan and Technical Proposal. Any modification of the management plan or the Technical Proposal deemed necessary in light of discoveries made during the field surveys shall also be identified. The mitigation plans shall discuss the timetables for completion of the final report for the phases of mitigation associated with data recovery, laboratory analyses, and artifact curation. The final report shall document the method, theory, and results of implementing the mitigation plans. The final report shall be filed with the Secretary of the Commission for staff review and submitted to the SHPOs and other appropriate agencies upon completion, in accordance with identified timetables. All sensitive materials shall be marked "*Privileged—Do Not Release.*"

PGT shall ensure that Indian tribes and identified interested groups and individuals will be consulted and provided the necessary information in order for those parties to respond to areas of historic value, including sacred areas, archaeological sites and their excavation, burials, and other ethnographic use areas, with particular reference to traditional plants, animals, and ritual areas. In general, sacred and archaeological sites shall be avoided whenever possible, burials shall be left undisturbed, and care shall be taken to avoid the destruction of traditionally used plants and animals. PGT shall provide copies

of all correspondence with the above parties, and all documentation on traditional Native American concerns resulting from the consultation, in the final report. Due to the sensitive nature of this information, it shall be provided to the appropriate SHPOs marked "Sensitive" and filed with the Secretary of the Commission marked *"Privileged—Do Not Release."*

Consideration shall be given to a monitoring program for ground-disturbing activities in areas where the cultural resource inventory indicates a likelihood that resources not now evident on the ground surface are likely to occur as buried resources. Such an "emergency discovery" program shall be consistent with the ACHP regulations at 36 C.F.R. Parts 800.5 and 800.11(a).

PGT shall not commence with the construction of its jurisdictional facilities until the FERC staff has: (1) reviewed and approved all cultural resource plans, surveys and reports, and mitigation plans and reports, and has considered any comments by the SHPOs and the ACHP, for both PGT's jurisdictional and PG&E's nonjurisdictional facilities, (2) PGT has agreed to any modifications of the mitigation plan which the ACHP and the FERC staff have agreed upon, and (3) the Director of OPPR has reviewed and approved all required information and has informed PGT, in writing, that construction may begin.

46. Prior to construction, PGT shall file with the Secretary of the Commission for staff review, a visual resource protection plan that incorporates the specific mitigative measures recommended for each location listed below. These mitigative measures are described in detail in Chapter 4L of the Final EIS. Where federally administered lands are involved, PGT shall file this plan concurrently with the appropriate land management agency for review and approval.

(a) MP 0.2-19.2: minimize clearing and stream crossing impacts, and the area affected by road crossings;

(b) MP 357.5-358.5: restore earthforms, retain rock outcroppings, and reduce surface contrast; and

(c) MP 465-511.2: minimize clearing and road crossing impacts.

47. PGT shall coordinate its blasting schedule within the boundaries of the Newberry National Volcanic Monument with the FS, and provide the FS the opportunity to temporarily close the Lava River Cave to visitors.

48. When constructing across National Forest System lands, PGT shall comply with the Standards and Guidelines of the Land and Resource Management Plan for the appropriate National Forest.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martin L. Allday, Chairman;
Charles A. Trabandt,
Elizabeth Anne Moler,
Jerry J. Langdon and Branko Terzic.

Pacific Gas Transmission Company	Docket Nos. CP89-460-000 CP89-460-001 CP90-1-000 (Not consolidated)

Preliminary Determination of Nonenvironmental Issues

(Issued January 22, 1991)

On October 3, 1989, Pacific Gas Transmission Company (PGT) filed an application in Docket No. CP90-1-000 for a Presidential Permit and for authorization, pursuant to section 3 of the Natural Gas Act (NGA), for the construction, operation, maintenance and siting of pipeline facilities at the U.S.-Canada border. Also in a prior order issued in Docket Nos. CP89-460-000 and CP89-460-001 on May 1, 1990,[1] we deferred action on PGT's amended application for authority, pursuant to section 7(c) of the Natural Gas Act (NGA), to expand its existing facilities to interconnect with other pipelines to transport Canadian gas to the Pacific Northwest, the intermountain region and California. We also directed staff to convene a technical conference to address certain concerns raised by the application, as subsequently amended, and numerous responsive pleadings.

Upon further consideration, we are prepared to grant the requested authorizations, with modifications, to the extent discussed below, subject to a final order in the above-referenced

---

[1] Pacific Gas Transmission Company and Altamont Gas Transportation Project, 51 FERC ¶ 61,112 (1990). (Hereinafter referred to as the May 1 order.)

dockets addressing environmental matters as part of a complete record in these proceedings. The order issued here does not consider or evaluate any of the environmental issues raised by the application. Those issues are still pending before the Commission and will be addressed in a subsequent order when our review and analysis of them are complete. Consequently, no certificate authorizations will be issued until a final decision is made by the Commission after consideration of all issues pertaining to the application.[2]

I. Background

A. *PGT's Existing System*

PGT owns and operates a natural gas pipeline system which extends approximately 612 miles from the U.S.-Canada border at a point near Kingsgate, British Columbia, to the Oregon-California border at a point near Malin, Oregon. It purchases approximately 1 Bcf per day of natural gas from Alberta & Southern Company Ltd. (Alberta & Southern), a wholly owned subsidiary of Pacific Gas & Electric Company (PG&E), PGT's parent corporation, at the international border, and transports that gas through the states of Idaho, Washington and Oregon, for resale to its sole sales customer, PG&E.[3] PGT also purchases small amounts (less than 10 MMcf/d) of U.S. gas from the Rocky Mountain area.

In addition, PGT has two firm pipeline transportation customers, Northwest Pipeline Corporation (Northwest) and Pacific Interstate Transmission Company (PITCO). In 1961, PGT began service for PG&E and Northwest's predecessor, El Paso Natural Gas Company (El Paso), over facilities which were

---

[2] The Commission intends to complete the environmental work and consider a final order in the second quarter of 1991.

[3] PG&E is an operating public utility under the jurisdiction of the Public Utilities Commission of the State of California (CPUC) and a Hinshaw pipeline, engaged in supplying electric and natural gas service throughout most of Northern and Central California.

certificated in 1960.[4] Using the original facilities, PGT transports up to 150.7 MMcf/d of Canadian gas for the account of Northwest to delivery points in the states of Idaho, Washington and Oregon. PGT's original facilities interconnect with those of Northwest near Stanfield, Oregon.

PGT also transports up to 300 MMcf/d of Canadian gas on behalf of PITCO through its existing system for delivery at the interconnection with the Northwest system near Stanfield. The firm service for PITCO is provided by 160.1 miles of existing 42-inch pipeline which loops portions of the 36-inch original facilities north of Stanfield. This looping was certificated in 1980 and constructed in 1981 as part of the Western Leg of the Alaska Natural Gas Transportation System (ANGTS) and is referred to as the "prebuild" facilities.[5] PGT also provides interruptible gas transportation for a number of shippers under section 7(c) of the NGA and section 311 of the NGPA. PGT states that its proposed facilities, together with the expanded California facilities of PG&E, will complete the U.S. portion of the Western Leg of the Alaska Natural Gas Transportation System (ANGTS).[6]

---

[4] These facilities, originally certificated in Pacific Gas Transmission Company, 24 FPC 134 (1960), are referred to as the "original facilities" and consist of approximately 639 miles of 36-inch gas transmission lines and other related facilities certificated from 1960 to 1970.

[5] The prebuild facilities were originally certificated by the Commission by orders issued January 11, 1980, January 13, 1980 and June 13, 1980 in Docket No. CP78-123 *et al.* Northwest Alaskan Pipeline Company *et al.* 10 FERC ¶ 61,032 (1980); 10 FERC ¶ 61,096 (1980), 11 FERC ¶ 61,302 (1980).

[6] PGT states that PGT and PG&E have been selected by the President to construct and operate the U.S. portion of the Western Leg of the ANGTS and to transport Alaskan North Slope gas to the lower 48 states under ANGTA. The Commission has issued PGT a conditional certificate to construct and operate the Western Leg and a final certificate to prebuild a portion thereof. The prebuilt U.S. portion of the Western Leg consists essentially of looping of the existing PGT and Northwest systems. The facilities proposed herein will complete the looping contemplated in

(footnote continues)

B. *California Decision on Interstate Capacity*

On December 19, 1988 and February 24, 1989, the CPUC issued orders establishing a state proceeding to investigate the need for additional pipeline capacity to serve California.[7] In its February 24 order, the CPUC determined, among other things, that a higher level of service for noncore customers is warranted[8] and that additional pipeline capacity would enhance service to the California market. The CPUC directed the California utilities to enter into discussions with pipeline proponents, end-users and others to reach agreements as to new and/or existing pipeline capacity.

The CPUC held a hearing before an administrative law judge (ALJ) during the summer of 1989 to receive evidence on the need for new capacity into California, capacity allocation, and cost allocation. In an Initial Decision issued on December 15, 1989, the ALJ found a need for 900 MMcf/d near-term capacity additions (1995) and 1.6 to 2.1 Bcf/d long-term capacity additions (by 2005) into the state of California. The ALJ recommended that the Kern River Transmission Company (Kern River) stand-alone project (in contrast to the Kern River/Mojave[9] project) would best serve California's needs. The ALJ

(footnote continued)

the original conditional certificate and provide the same beneficial effect as the original prebuild which is to allow for early construction at lower cost, of facilities that will ultimately connect to Alaskan gas supplies. (*See* Pacific Gas Transmission Company, 1 FERC ¶ 61,248 (1977); Pacific Gas Transmission Company, Docket No. CP78-123 *et al.*, 10 FERC ¶ 61,032 (1980); 10 FERC ¶ 61,096 (1980); 11 FERC ¶ 61,088 (1980)).

[7] *See* Order Instituting Investigation on the Commission's Own Motion into the Interstate Natural Gas Pipeline Supply and Capacity Available to California, and Order Requiring Proposals for New Pipeline Capacity, Docket No. I. 88-12-027, issued December 19, 1988; Interim Opinion, issued February 24, 1989.

[8] "Core customers" are residential and commercial customers who do not have alternative fuel capability. Noncore customers consist of everyone else. Core customers have the highest priority of service.

[9] Mojave Pipeline Company.

also recommended for approval a smaller 200 MMcf/d expansion by SoCal Gas.

In February 1990, the CPUC issued its final decision modifying the ALJ's position by eliminating the preference for the Kern River stand-alone project in favor of further negotiations and competitive forces. The order also requires that the utilities shall show no preference for their own affiliates' gas supplies, except as required to fulfill preexisting contract obligations.

II. PGT Applications

A. *Expansion Applications*

1. *The Original Application*

On December 8, 1988, PGT filed an application in Docket No. CP89-460-000, pursuant to section 7(c) of the NGA, for a certificate to construct and operate a substantial expansion of its already existing pipeline system and to provide firm transportation in interstate commerce of natural gas for certain large utility customers located in the Pacific Northwest (Washington and Oregon) and in California. The authorization requested would allow approximately 710 MMcf per day of natural gas on a firm annual basis to be received at Kingsgate, British Columbia. From Kingsgate, approximately 150 MMcf per day of gas on a firm annual basis would be delivered to the Pacific Northwest and 600 MMcf per day of gas on a firm annual basis would be delivered to an existing interconnection with PGT's parent, PG&E, at Malin, California. California deliveries would be completed through an expansion of the PG&E system.[10]

---

[10] On April 14, 1989, in Docket (A.) 89-04-033, PG&E filed an application with the CPUC for authority to expand its existing intrastate natural gas pipeline system from the California-Oregon border near Malin to Kern River Station. The expanded facilities would accommodate PG&E's receipt at Malin of Canadian gas from PGT for redelivery by PG&E at the Kern River Station, Kern River County, California. On October 3, 1989,

(footnote continues)

2. *The Amended Application*

On October 3, 1989, PGT filed in Docket No. CP89-460-001 its amendment to its expansion project to reflect the fact that capacity on its expansion project had been fully subscribed through the execution of exclusive precedent agreements. PGT's amendment altered the design of the proposed facilities in order to increase the volumes delivered and to provide seasonal service. The revised facility proposal includes 430 miles of 42-inch diameter looping on PGT's existing system, instead of 36-inch diameter looping as originally proposed.

PGT also planned to add additional delivery points, to provide interruptible transportation, and to revise its proposed receipts and deliveries as follows:

Receipts (including fuel and line losses):
872 MMcf/d at Kingsgate, British Columbia
62 MMcf/d at Stanfield, Oregon[11]
934 MMcf/d total receipts

(footnote continued)

PG&E filed its supplement to the application to increase the capacity of the expansion from 600 MMcf/d to 755 MMcf/d. On January 12, 1990, PG&E filed another amendment with the CPUC reflecting the partial assignments of the Precedent Agreement of the City of Long Beach.

On November 27, 1990, a CPUC administrative law judge (ALJ) issued a preliminary decision, recommending that the CPUC grant PG&E authorization to build its expansion and to add its proposed delivery point at Kern River Station. However, the ALJ directed PG&E: (1) to demonstrate the need for its proposed 100 MMcf/d subscription to firm capacity on PGT's expansion project, and (2) to determine whether the market for natural gas transportation justifies construction of the PG&E project and demonstrate the reasonableness of such justification in its first general rate case. The ALJ directed that PG&E's general rate case will be filed no later than two years after PG&E has notified the CPUC of its acceptance of the certificate and no less than six months before the scheduled date of operation.

[11] These receipts at Stanfield would be received through the facilities of Northwest.

Deliveries:

150 MMcf/d in the Pacific Northwest
766 MMcf/d to PG&E near Malin, Oregon for deliveries to Kern County, California.
916 MMcf/d total deliveries[12]

PGT states that it intends to provide firm and interruptible transportation services on these new, incremental facilities.

a. *PGT's Expansion Project Shippers*

PGT's expansion shippers and their respective volumes, as of October 1990, are reflected in the chart below:

PGT-PG&E Expansion Project

Daily Contract Quantities at Associated Receipt and Delivery Points

Pacific Northwest	Annual Average MMcfd	Winter MMcfd	Summer MMcfd
Kingsgate, BC to Spokane, Wash.:			
Washington Water Power	45	60	30
Kingsgate, BC to Stanfield, OR:			
Cascade Natural Gas	30	37.5	22.5
IGI Resources	33	38	28
Northwest Natural Gas	40	50	-30
Total Pacific NW:	148	185.5	110.5

[12] Because these figures are on a firm annual average basis, the receipts and deliveries indicated are approximate. Also, the receipts include fuel and line loss volumes.

California	
Kingsgate, BC to Kern Riv. Station:	
American Hunter Ex	50
Bonneville Fuels	4
BP Gas, Inc.	21
City of Burbank	5
City of Glendale	5
City of Pasadena	5
NATGAS US Inc.	50
North Canadian Marketing	50
PG&E	100
Pancontinental Oil	5
Salmon Resources Ltd	50
San Diego Gas & Elec.	100
SoCal Edison	200
Suncor Inc.	50
Stanfield, OR to Kern Riv. Station:	
BP Resources Canada Ltd.	10
Williams Gas Marketing	50
Total California:	755

b. *Proposed Expansion Facilities*

PGT proposes to construct 430 miles of 42-inch pipeline looping along its existing system which will operate at the same maximum pressure as PGT's existing pipeline, which is 911 psig. PGT's existing compressor stations will be used. Horsepower additions are proposed at three compressor stations. PGT will install an additional gas-fired turbine and compressor at Compressor Station #3 in Northern Idaho, and replace existing 9,100 horsepower compressors at Compressor Stations #5 and #7 in western Idaho and central Washington state with 25,000 horsepower gas-fired turbines and compressors. Turbines used to drive the other existing compressors are expected to remain in place for the new service. Compressor equipment replacement will be required on 22 existing units at 11 existing stations. Piping, control, and scrubber equipment changes will be required at 12 existing compressor stations. PGT states that it will expand existing metering facilities to allow for increased flows and additional taps and meters will be installed for off-line deliveries at Wallula, Washington and Hermiston, Oregon.

c. *Capital Costs*

Capital costs, including allowance for funds used during construction, for the PGT portion of the expansion project are estimated, on a 1988 fourth quarter cost basis, at $635,050,000. PGT proposes to initially finance the expansion project with a projected mix of 70 percent debt and 30 percent equity capital. PGT proposes to depreciate the expansion project based on a 30-year life.

d. *PGT's Proposed Rate Design*

PGT proposes to render firm and interruptible transportation service via the expansion facilities. PGT proposes to add a new Rate Schedule T-3 and an associated form of service agreement for firm transportation to its FERC Gas Tariff Second Revised Volume No. 1. PGT states that it will provide interruptible transportation on the expansion facilities on an open-access basis using its currently effective system-wide interruptible transportation rate.

The rate structure proposed for firm transportation consists of six mileage-based, one-part monthly reservation charges that recover the total incremental fixed costs allocated to firm transportation. PGT has allocated approximately four percent of the expansion facilities' cost of service to interruptible transportation using the expansion facilities. Although PGT does not propose seasonal rates for the new service, it has offered its expansion project customers seasonal maximum daily quantities (MDQs). The proposed rates are based on the customers' average annual MDQs where appropriate. The illustrative reservation charges that PGT proposes are based on a cost of service that reflects a 3.33-percent straight-line depreciation rate, an annual negative salvage provision equal to 0.042 percent of gross plant, a 70/30 debt-equity ratio, a 10.00-percent cost of debt, and a 14.00-percent rate of return on equity.

The rates proposed by PGT for service under Rate Schedule T-3, exclusive of applicable ACA and GRI charges, are as follows:

	Monthly Reservation Charge (per Mcf)
Kingsgate to Spokane, Washington	$ 2.079
Kingsgate to Wallula, Washington	$ 4.906
Kingsgate to Stanfield, Washington	$ 5.324
Kingsgate to Hermiston, Oregon	$ 5.398
Kingsgate to Malin, Oregon	$11.756
Stanfield to Malin	$ 6.432

Rate Schedule T-3 also provides that compressor fuel, line losses, and unaccounted-for gas will be furnished in kind by shippers at percentages that vary with the length of haul.

3. *The Settlement*

On November 8, 1989, PGT filed in Docket No. CP89-460-001 what it characterized as an "Offer of Settlement" (settlement) reached by PGT and its transportation customers to be served by the expansion project. The settlement includes a Stipulation and Agreement between PGT and its expansion shippers, although no other parties to the proceeding have agreed to or even participated in its creation. For the reasons stated in subsection A of section IV of this order, we will reject the settlement as defective.[13]

[13] Parties that filed comments on the settlement are identified on Appendix C.

B. *Application for NGA section 3 authorization and a Presidential Permit*

On October 3, 1989, PGT filed its application for NGA section 3 authorization and a Presidential Permit to construct, operate, maintain and connect proposed additions or modifications to its facilities operated at the International Boundary between Canada and the U.S. for the transportation service proposed in Docket Nos. CP89-460-000 and CP89-460-001.

The proposed facilities would consist of a 42-inch diameter buried pipe at the International Boundary. On the U.S. side, the pipe will connect with PGT's existing Station No. 3 Compressor Station approximately two and one half miles from the International Boundary. On the Canadian side, the pipe will connect with a new 42-inch diameter buried pipe of Alberta Natural Gas Company Ltd. (Alberta) and Foothills Pipeline (South British Columbia) Ltd. system approximately 118 feet from the existing Kingsgate Meter Station just north of the International Boundary.

PGT states that its proposal is not inconsistent with the public interest and does not, in any way, impair the ability of PGT to render natural gas service at reasonable rates to its customers in the United States. It contends that neither PGT nor its pipeline will be owned in any part by any foreign government or directly or indirectly subvened by any foreign government. According to PGT, it has no understanding with any foreign government for such ownership or subvention.

Nor, states PGT, does it have any existing contracts with any foreign government which relate to the control or fixing of rates for the purchase, sale or transportation of natural gas and which would restrict or prevent competing American companies from extending their own activities. PGT asserts that its existing gas sales contract with Alberta & Southern, in effect since 1961, establishes the prices under which PGT purchases over 99.4% of its gas supply for transportation over its original facilities to PG&E. Also, it explains, these prices which are based upon arms length negotiations between PG&E/PGT/Alberta &

Southern and Canadian producers, have been approved by both Canadian and U.S. regulatory agencies and are based upon competing energy sources within the PG&E market. Moreover, says PGT, this contract in no way restricts or prevents competing American companies from extending their own activities.

III. Procedural Posture

A. *Responsive Pleadings*

After due notice of: (1) PGT's original expansion application by publication in the Federal Register on January 5, 1989 in Docket No. CP89-460-000 (54 *Fed. Reg.* 1211), (2) its amended expansion application by publication in the Federal Register on October 24, 1989 in Docket No. CP89-460-001 (54 *Fed. Reg.* 43,322), and (3) its application for NGA section 3 and a Presidential Permit by publication in the Federal Register on October 24, 1989 in Docket No. CP90-1-000 (54 *Fed. Reg.* 43,322), timely uncontested and late motions to intervene were filed by the parties identified in Appendices A, B and D.[14] We will grant the late motions to intervene, for good cause and because we do not perceive any prejudice or delay that would be caused by granting the late motions.

PGT's amendment addressed and resolved many of the issues raised by the original intervenors. Primarily, the parties complained that PGT proposed to serve only large California utilities thereby restricting pipeline access, that PGT would not honor other requests for service, and that PGT was not offering interruptible service. The parties believed that PGT was acting in a discriminatory manner by restricting access to utility customers and their affiliates.

In addition, several allegedly competitive pipelines protested various aspects of the filing on the grounds that it may

---

[14] By operation of Rule 214 of the Commission's Rules of Practice and Procedure, unopposed timely motions to intervene are granted automatically.

affect their proposed market; these were: Altamont, APEX,[15] MexUS Interstate Pipeline Inc., and Kern River. Northwest and SoCal Gas raised the issue of duplicative facilities and argued that PGT proposes to serve their market. Mojave and WyCal did not protest PGT's filing, but did point out that they may serve the same market.

The Producer Associations question the need for the project and whether the pipeline sizing departs from that approved under ANGTA. PGT's change in pipeline sizing in its amendment rendered the argument about pipeline sizing moot.

Others argued that the expansion project perpetuates PG&E's monopoly control over access and distribution of Canadian supplies into California and is thereby inconsistent with the Commission's policy of increased competition. On July 27, 1990, the Commission issued PGT a blanket transportation certificate in Docket No. CP90-1031-000 [52 FERC ¶ 62,075], which PGT accepted on August 10, 1990. Such authorization will increase the options available to shippers with respect to moving Canadian gas over existing facilities.

Opposition to the amendment was received from Kern River, PITCO, Petro-Canada,[16] and Southern California Gas Company (SoCal Gas). Kern River is a competitor; Petro-Canada is a participant in the Altamont project, as is SoCal Gas. PITCO is the largest nonaffiliated customer of PGT and may be a shipper on the Altamont project. Notwithstanding the connections of the opponents with competing projects, these parties raise the issue that the last-minute addition of PG&E as a shipper on the Expansion Project is an attempt by PGT/PG&E to shift some of the risks and costs of the project to captive downstream customers (of PG&E) in California so that PGT can decrease the unit cost of transportation for PGT's target markets in Southern California.

---

[15] APEX is an acronym for the Alternative Pipeline Expansion Project.

[16] Petro-Canada Inn and Petro-Canada Hydrocarbons Inc. (jointly).

In addition, PITCO argues that it has been paying PGT for the incremental prebuild facilities on an accelerated depreciation basis. PGT now proposes that the prebuild facilities will be used to provide service to the expansion customers, yet PGT assigns no costs of the existing facilities to the expansion shippers. PGT also does not address the possibility of a credit to PITCO to compensate PITCO for use by the new customers of the original ANGTS looping. These issues relate to how the project may affect rates that are not before the Commission in this proceeding. They are more appropriately raised in PGT's next rate case.

PGT states that copies of the settlement were served upon all persons on the Commission's service list and that in accordance with section 602(d)(2) of the Commission's Rules of Practice and Procedure initial comments and reply comments on the settlement were required to be filed with the Secretary of the Commission on or before November 28, 1989 and December 8, 1989, respectively. Several comments were filed in response to the settlement by the parties identified in Appendix D.

B. *May 1 Order*

In the May 1 order, *supra,* the Commission directed PGT and Altamont Gas Transmission Company (Altamont) to file information identified in Appendix F to that order on or before May 15, 1990. The Commission stated that if the information was not filed in satisfactory form, the Director of the Office of Pipeline and Producer Regulation (OPPR) shall reject their applications, without prejudice to their refiling new applications. In addition, the May 1 order directed staff to convene a technical conference on June 14 and 15 (1990) to explore the issues to be identified in a subsequent notice.[17] In compliance

[17] By order issued on May 31, 1990 (51 FERC ¶ 61,265), the Commission postponed the June conference dates. In a subsequent notice issued on June 28, 1990, the Commission rescheduled the conference for July 12 and 13, 1990, and identified the issues to be explored at the technical conference.

with the directive of the May 1 order, PGT filed voluminous information on May 15, 1990, which was subsequently supplemented at the technical conference.

C. *Technical Conference*

The staff convened a technical conference on July 12 and 13, 1990, and filed its technical conference report on September 18, 1990. At the conference, the participants were given an opportunity to address the issues identified in the June 28 notice. In addition, several comments regarding the issues explored at the conference were filed within two weeks after the close of the conference. (*See* Appendix E to this order.)

The technical conference facilitated discussions between PGT and two expansion project opponents (*i.e.,* Bonus Gas Processors, Inc. (Bonus) and Bonneville Fuels Corporation (Bonneville)). By letter addressed to the Commission dated July 27, 1990, Bonus stated that as a result of further discussions with PGT, it has resolved its differences with PGT and has agreed to withdraw its objections to the pending settlement in this proceeding.

Similarly, on July 30, 1990, Bonneville filed a letter stating that its concerns about PGT's capacity allocation mechanism have now been resolved. Bonneville and Bonus urge the Commission to process PGT's application and related settlement offer expeditiously.

In its comments on the technical conference, PGT notes that it contacted Petro-Canada after the conference in order to initiate discussions since Petro- Canada had expressed interest in expansion capacity. According to PGT, Petro- Canada indicated that it was no longer interested in capacity on the expansion project. However, as of the date of this order, Petro-Canada has not withdrawn its opposition to PGT's Project.

IV. Discussion

Since the proposed facilities and services will be in interstate commerce subject to the jurisdiction of the Commission, the services and the construction and operation of the facilities are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.

A. *PGT's Section 7(c) Certificate Applications*

1. *PGT's Offer of Settlement*

a. *PGT's Position*

On November 8, 1989, in Docket No. CP89-460-001, PGT filed an offer of settlement (settlement) reached by PGT and its transportation customers who have executed precedent agreements for firm service on the expansion project. PGT states that the settlement — which includes a cover letter, an explanatory statement, a stipulation and agreement, and a proposed Commission order approving the settlement — would resolve all nonenvironmental issues and does not present any genuine issues of material fact which require an evidentiary hearing.[18]

PGT asserts that the public at large will be served by the settlement because the proposed expansion under the terms of the settlement would increase PGT's capacity to serve customer demand growth in the Pacific Northwest and California, increase supply diversity and reliability, provide benefits to be realized from gas-to-gas competition, and avoid litigation costs which would otherwise be incurred. Hence, PGT requests approval of the settlement.

---

[18] The settlement, which essentially incorporates the terms of the amended application, differs from the amended application in that it contains minor changes in rates and rate design.

b. *The Settlement Opponents' Position*

Thirty-three parties filed comments to the settlement. Of those, fifteen oppose the settlement. (*See* Appendix C.) Several settlement opponents argue (1) that PGT has not engaged in negotiations with any other nonshipper who raised issues concerning the public convenience and necessity of PGT's original expansion project and the amended expansion project, or (2) that the purported settlement does not settle most of the issues which have been raised on the record.[19]

Other commenters, who oppose the proposed settlement, allege that the proposed settlement would have adverse rate design and anticompetitive consequences. Canadian Indicated Producers (CIPS)[20] object to the rolled-in pricing proposal under the settlement.[21] Under such a proposal, CIPS members

---

[19] Altamont's settlement comments at 4, and Kern River's initial comments at 1. *See generally,* the settlement comments of Bonneville Fuels Corporation (Bonneville Fuel), and Bonus Energy, Inc. (Bonus).

[20] The CIPS members are an *ad hoc* association of producer companies with reserves and production facilities in Canada who have dedicated substantial reserves of gas to Alberta & Southern (A&S), a subsidiary of PG&E, and already supply a substantial portion of the gas purchased by PG&E from PGT to serve Northern California.

[21] According to PGT, under article VII of the proposed settlement the parties agreed that initial rates will be established based on the incremental cost of service of PGT's proposed facilities. However, explains PGT, the settlement parties agreed that PGT would file with the Commission a general rate case under section 4 of the NGA not later than 14 months after the in-service date of the proposed facilities. In that filing, states PGT, it will provide the Commission with the documentation necessary to support and implement either incremental or rolled-in cost allocation principles. In that proceeding, PGT contends that the shippers will be free to present their views on cost allocation for ultimate resolution by the Commission, and PGT will not oppose the use of rolled-in cost allocation principles nor support any specific alternative cost allocation principles. However, PGT also asserts that if it receives acceptable assurances that the CPUC will not oppose rolled-in cost allocation, PGT will file, as soon as possible, a section 4 general rate case requesting rolled-in cost allocation. In light of the above statements, it is unclear whether PGT has committed itself to propose rolled-in cost allocation.

state that they and other existing customers would be required to bear the costs of facilities for which they receive no benefit. In any event, they state, the rolled-in pricing issue should be deferred to a future section 4 rate case.

Amoco Canada Petroleum Company Ltd. (Amoco Canada) also challenges PGT's settlement proposal to file a section 4 rate case in which it would propose rolled-in pricing. In effect, it states, PGT seeks to receive the benefits of an optional certificate without assuming any of the risks. Amoco Canada also points out that PGT's Pacific Northwest customers are already served by Northwest which has significant unused capacity. For example, states Amoco Canada, Northwest's current daily capacity is 964 MMcf while its market only requires about 350 MMcf per day of capacity. Amoco Canada also claims that the customers could get a better deal for British Columbia gas through Northwest's system than for Alberta gas through PGT. Amoco Canada asserts that these and other comments raised numerous disputed issues of fact necessitating an evidentiary hearing.

The California Industrial Group (Industrials), an *ad hoc* association of industrial customers with facilities located in California, oppose the settlement because they believe that the proposed incremental pricing exacerbates the discriminatory effect of different rates for the same service. On the other hand, they argue that rolled-in rates would discriminate against Northern Californian ratepayers by requiring them to subsidize the cost of delivering gas to Southern California. The Industrials contend that the PGT Project is designed primarily to serve markets in Southern California and, as a result, reasonable access to existing facilities in Northern California will continue to be denied to shippers other than PG&E. Industrials note that the transportation service to the California market is linked to the downstream service to be provided by PGT's parent, PG&E, through its own expansion.

Several pipeline competitors of PGT in the California market also oppose the purported settlement. El Paso Natural

Gas Company (El Paso) believes that PGT unfairly seeks, under the guise of a traditional NGA section 7(c) applicant, the administrative advantages of an optional applicant without the commensurate assumption of risk. El Paso believes that proposed rolled-in pricing methodology would shift the risk of the project onto existing shippers giving PGT an undue competitive advantage resulting from the regulatory process and not from PGT's own initiative. El Paso states that the ability to file a rate change to reallocate costs is one of the premier advantages of a traditional section 7(c) filing and one of the significant risks assumed by an optional certificate.

Finally, Kern River contends that PGT plans to use its captive customers of PG&E to subsidize rates to the expansion shippers and, for this reason, requests a hearing. Mojave Pipeline Company argues that the settlement is merely an attempt by PGT to get around the Commission's traditional section 7(c) procedures.

c. *Settlement Conclusion*

We note that there are several differences between PGT's amendment of its application and its settlement. In exhibit K, the settlement shows an increase in the project cost from $635,050,000 to $635,450,000; part of this may be from a projected increase in the finance charge and capitalization taxes from $58.3 million to $58.7 million. In exhibit L, PGT proposes that its equity investment earn a rate of 14.25% in the settlement in contrast to its amendment which proposes a rate of 14%. In exhibit O of the settlement, PGT proposes to depreciate the expansion facilities over 30 years using a schedule which is designed to maintain a constant total cost of service over the first ten years of pipeline operations, in contrast to proposing a straight-line rate of 3.3333 percent per year in its amendment. This constant total cost of service results in a lower depreciation expense than straight-line in the early years of operation and greater depreciation expense in later years. PGT notes in its settlement that if a rolled-in cost allocation were adopted, PGT would propose to use straight-line depreciation.

In exhibit P of the settlement, PGT states that the proposed rate structure for firm transportation service consists of a one-part, monthly reservation charge which recovers 90% of the total fixed costs allocated to firm transportation service and a usage charge which recovers any remaining fixed costs allocated to firm transportation service not recovered in the reservation charge plus any variable costs (excluding fuel). This contrasts with PGT's amendment which proposes a rate structure for firm transportation service consisting of a one-part, monthly reservation charge which recovers the total fixed costs allocated to firm transportation service. This proposed change in rate methodology results in lower overall rates than those proposed in PGT's amendment.

In our May 1 order (51 FERC at p. 61,261), we stated that:

> At this time, we do not believe that the changes in rates and rate design proposed under the settlement constitute sufficient revisions to the amended application to require that the settlement be noticed and treated as a further amendment to the amended application. However, we will defer ruling on this matter since the issue of the integrity of the settlement will be explored at the technical conference which we will direct staff to convene *infra*.

At this juncture, we need not decide whether or not the changes proposed by PGT's "offer of settlement" should be considered an amendment to its certificate application. The fact is, the "settlement" proposed by PGT is a settlement in name only. We agree with the opponents that the purported settlement does not address many of the issues raised in the expansion proceeding and several parties who sought access to the amended expansion project were refused access. Further, at the July 13 technical conference, PGT admitted that it did not attempt to settle with all the parties. In particular, it stated that "the settlement discussions were confined to those shippers who were awarded capacity on the project."[22] Given the failure

---

[22] Transcript at 278.

of PGT to even attempt to conduct settlement discussions with the shippers who had not already secured capacity on the expansion project,[23] we believe it would be a waste of administrative resources to attempt to process this latest filing under the procedures set forth in Rule 602 of the Commission's Rules of Practice and Procedure. This leaves for consideration the amended expansion application, as subsequently supplemented by PGT's responses to the May 1 order and staff's data requests. Because we will not accept PGT's purported "settlement", we will not address the remaining arguments in opposition to the settlement, including the need for an evidentiary hearing.

2. *Rate Design*

a. *Rate Design Issues Raised in the Interventions and Protests*

The interventions and protests filed in this proceeding raise significant rate issues relating to the propriety of incremental versus rolled-in rates, and the appropriateness of the proposed cost allocation and rate design. In its protest Petro-Canada requests that the Commission carefully scrutinize PGT's amended application to determine "whether or not PGT has inequitably allocated costs and otherwise designed its rates to the disadvantage of customers such as Petro-Canada utilizing its existing facilities." Kern River states that the application raises "material issues of fact, including issues of . . . cost allocation [and] rate design" but gives no specifics.

---

[23] Following the technical conference, PGT did engage in talks with Bonus Gas Processors of Calgary (Bonus) and Bonneville Fuels Corporation (Bonneville). The discussions resulted in arrangements for service for these two parties and withdrawal of their opposition to the settlement. Nevertheless, there remains at least one party which has not been able to obtain capacity. Windward Energy & Marketing Company (Windward) intervened initially in opposition because it was unable to obtain capacity; there is no indication that PGT attempted to accommodate Windward. It also appears that the California Industries may have been denied capacity through the tying of interstate and intrastate transportation.

We do not agree with Kern River.]The issues of cost allocation and rate design are matters of Commission policy, which we will discuss below. As to the request of Petro-Canada, our review of PGT's rates includes an examination of whether or not PGT has inequitably allocated costs and otherwise designed its rates to the disadvantage of its existing customers.

Kern River further protests the amendment to the application, stating that the presence of PGT's affiliate, PG&E, as a shipper on the expansion facilities is "a transparent effort to shift some of the risks and costs of the project to captive downstream customers" and cites *Great Lakes Gas Transmission*[24] as an instance where the Commission rejected an attempt by a pipeline to shift the cost of an expansion to an affiliate. *Great Lakes,* however, is distinguishable from PGT. For one thing, *Great Lakes* involved affiliate transactions under an optional certificate, which precludes shifting costs to existing customers and requires that the applicant assume the risks of the project. PGT, on the other hand, seeks traditional 7(c) authority which is not subject to automatic conditions regarding risk assumption, as required under an optional certificate application.

Producer Associations (Producers) request a hearing, claiming that PGT's proposal to charge incremental rates for service using the expansion project is contrary to general Commission policies, that the proposed service will not make an appropriate contribution to the fixed costs of the existing PGT system, that PGT has improperly requested authority for selective discounting of reservation fees, that any certificate issued here should be conditioned upon PGT filing new tariffs to remove the special treatment accorded the Added Facilities under the ANGTS, with all costs rolled-in to provide a single, generally applicable firm and interruptible transportation rate.

Producers' argument that the use of incremental rates for incremental facilities are contrary to Commission policy is

---

[24] 37 FERC ¶ 61,270 (1986).

incorrect. As discussed below, we have approved the conditional use of such rates. In addition, we note that Producers' concern about selective discounting has been mooted by the filing of PGT's amended application, in which PGT no longer seeks discounting authority. As to Producers' claim that the proposed service will not contribute to the existing system's fixed costs, we note that to the extent Producers seek relief that would involve a change in rates now in effect on PGT's system, such matters are more appropriately raised in PGT's next section 4 proceeding.[25]

Southern California Gas Company states that "[t]he appropriate allocation of costs between existing and new customers of PGT is a matter that must be set for hearing." Pacific Interstate Transmission Company and Northwest Pipeline Corporation raise the same issue. As we noted above, the proper forum for the examination of the cost allocation issue is PGT's next section 4 rate proceeding. In this connection, we note that PGT must file new general system rates to be effective no later than November 1, 1993, which coincides approximately with the expansion project's anticipated in-service date.

b. *Rate Design Conclusion*

(1). *Incremental rates*

We will approve the proposed use of incremental rates for service under Rate schedule T-3. The Commission's practice has been to approve an incremental rate as an initial rate in a section 7 proceeding where, as in the instant proceeding, a showing has been made that specific incremental markets would be the principal beneficiaries of the proposed facilities and where such treatment is generally supported by the affected

---

[25] The Commission cannot adjust previously approved rates not before it in a certificate proceeding. *See, e.g.,* Northern Natural Gas Company, Division of Internorth v. FERC, 827 F.2d 779, 789-796 (D.C. Cir. 1987).

parties.[26] However, the Commission has commonly emphasized that such incremental rates are initial rates which establish no principles or precedents and that such authorization is without prejudice to the rights of the parties and the Commission staff to argue for alternative rate treatment in future rate proceedings after the proposed facilities have been placed in service.[27] In this way, the Commission has ensured that future rates could be designed in a way which would assign costs associated with joint-use facilities to those customers who derive benefits from such facilities, regardless of their original purpose. Applying that reasoning and with a similar caveat, we find that incremental rates are appropriate as initial rates for PGT's expansion facilities.

(a). *100 percent demand charge*

We are concerned, however, with PGT's proposed use of a 100-percent reservation (or demand) charge to recover the incremental costs associated with the new facilities. We note that new rates for PGT's existing services became effective, subject to refund, on November 1, 1990, pursuant to the Commission's order accepting tariff sheets filed by PGT in Docket No. RP90-109-000.[28] In calculating the newly effective rates, PGT used an enhanced fixed-variable rate design in which it classified approximately 51 percent of its proposed equity return and related taxes to the commodity rate.

We will require PGT to use the same rate design for the proposed expansion facilities as it used for its currently effective rates in Docket No. RP90-109-000. PGT's use of the enhanced fixed-variable rate design would reflect the Commission's desire to maintain consistency between the rate design used for incremental facilities and the pipeline's system-wide rate design as

---

[26] *See, e.g.,* Tennessee Gas Pipeline Company *et al.*, 51 FERC ¶ 61,113, at p. 61,274 (1990) (NIPPS II).

[27] *Id.*

[28] Pacific Gas Transmission Company, 51 FERC ¶ 61,246 (1990).

articulated in recent certificate proceedings.[29] Our decision regarding initial rates herein does not constitute an endorsement of any underlying rate methodology, principle, or concept.

Additionally, when PGT's rates are next reviewed in a section 4 or 5 proceeding, we will require that all participants to those proceedings, including the Commission staff, adhere to the guidance and direction of the policy statement on rate design (policy statement)[30] and develop a record consistent with the content of the policy statement in all particulars. Consistent with our above discussion, we require PGT to file revised tariff sheets reflecting the following initial rates for service on the proposed expansion facilities, subject to adjustment to reflect the final rate design methodology authorized in Docket No. RP90-109-000:

	Monthly Reservation Charge	Usage
	(per Mcf)	(per Mcf)
Kingsgate to Spokane, WA	$1.6697	$0.01137
Kingsgate to Wallula, WA	$3.9411	$0.02684
Kingsgate to Stanfield, WA	$4.2768	$0.02912
Kingsgate to Hermiston, OR	$4.3358	$0.02953
Kingsgate to Malin, OR	$9.4435	$0.06431
Stanfield to Malin, OR	$5.1668	$0.03518

[29] *See, e.g.,* Iroquois Gas Transmission System *et al.*, (Iroquois II), *supra,* 53 FERC ¶ 61,194, *mimeo,* at 61-63 (1990), *granting in part and denying in part,* Iroquois Gas Transmission System *et al.*, 52 FERC ¶ 61,091 (1990) (Iroquois I).

[30] Interstate Natural Gas Pipeline Rate Design, 47 FERC ¶ 61, 295 (1989), *reh'g granted and denied in part,* 48 FERC ¶ 61,122 (1989).

3. *Cost of Service*

Upon review of the illustrative cost of service proposed by PGT in its amended application, we have adopted certain cost of service elements for our calculation of the above rates that we will approve. These elements include the capital structure and debt cost, the level of operation and maintenance expenses, the level of taxes other than income taxes, and the depreciation and negative salvage rates. In addition, we find that the proposed allocation of costs to interruptible service and the Mcf-mile analysis used in PGT's amended application are appropriate for establishing the rates in this proceeding. However, as we discuss below, we have modified other elements as appropriate.

a. *Throughput level*

In its amended application, PGT makes no projection of annual throughput on the expansion facilities since it proposes no usage charge. However, we note that under the settlement (which we reject for other reasons), PGT projected an annual usage level equal to 95% of MDQ. For this reason and because we have recently approved a 95 percent load factor throughput level for the calculation of volumetric rates of pipelines that will serve the California market, we will adopt this load factor for the development of PGT's usage rates.[31]

b. *Design Capacity*

As discussed in 4.i below, we will authorize PGT to transport approximately 62 MMcf per day of gas that would require additional upstream capacity on Northwest's system. We have based our rates on the full MDQ level proposed by PGT in its amended application because the proposed facilities have been properly sized to accommodate the proposed MDQ level. Basing rates on a lesser MDQ level could result in PGT's over-recovering its costs.

---

[31] See, *e.g.*, Altamont Gas Transmission Company, Docket No. CP90-1372-000, *et al.*, 54 FERC ¶ 61,028 (1991), which was issued January 17, 1991.

c. *Depreciation Life*

In analyzing PGT's proposal to depreciate the expansion facilities over a period of 30 years, we observe that the gas reserve life of the current proven Canadian gas supply is approximately 25 years. Although this can be considered a base indicator of the economic life of a project dependent on Canadian gas supply, it is not an absolute one. We recognize that there are future potential reserves in Canada that may be developed which will extend the economic life of the project. Proven natural gas reserves in Canada, according to the latest National Energy Board Study, *Canadian Energy Supply and Demand 1987-2005*, are estimated at 71.5 trillion cubic feet (Tcf) for conventional areas (primarily Alberta) and 16.7 Tcf for frontier regions. Combined total proven Canadian reserves total 88.2 Tcf and current Canadian domestic demand is 2.2 Tcf, with exports of about 1.4 Tcf, for total Canadian production of 3.6 Tcf. Dividing the known proven reserves by current total production gives a reserves-to- production ratio of 24.5 years.

Additionally, there is a large remaining potential reserve base in Canada from both the conventional western Canadian sedimentary basin and from frontier areas. PGT compiled a number of these estimates for its Exhibit H in this proceeding. The estimates average 157 Tcf for the western Canadian conventional area alone and 268 Tcf for the frontier regions. A conservative estimate (*i.e.*, adding only the reserve estimate for the western Canadian conventional area to our Canadian reserves) would result in a proven and potential resource base of 245.2 Tcf and a reserves-to-production ratio of over 68 years. These reserves, of course, are not all currently available to the PGT project since they have not all been developed. However, given the location of the PGT facilities, and the fact that significant PGT facilities are already in the ground importing Canadian natural gas supplies, we will permit PGT to utilize 30-year economic life for depreciation purposes.

Parties will be allowed to raise the issue of extended economic life if, during the course of a future rate proceeding

and after the actual operation of the expanded facilities, there become available facts which may justify an extension of economic life of such facilities.

d. *Rate of Return*

1. *Long-Term Debt*

As noted previously, we will approve PGT's proposed 10.00 percent cost of long-term debt based on the rates of Baa-rated public utility bonds of similar projects.[32] In addition, we note that the proposed long-term debt is in line with the 10.00 percent debt costs approved in recent cases such as *Wycal*[33] and *Kern River I*.[34]

2. *Rate of Return on Equity*

We will disallow the 14.00-percent rate of return on equity proposed by PGT and require PGT to use a 12.75-percent rate of return on equity. Our approval of a 12.75-percent rate of return on equity is derived from a range of returns based upon an analysis of recent interest rates and a discounted cash flow (DCF) study.

The lower end of the range is determined by the prevailing Baa rating for public utility bonds, which, as previously noted, averaged 10.13 percent for the six months ended October 1990. This yield is used to establish the lower end of the range

---

[32] We note, for example, that during October 1990, the average yield on Baa public utility bonds was 10.28 percent. The latest 3-month average was 10.24 percent, and the latest 6-month average was 10.13 percent. Consequently, the debt cost of 10.00 percent requested by the company is a conservative reflection of prevailing financial market conditions.

[33] Wyoming-California Pipeline Company, 50 FERC ¶ 61,070 at 61,174 (1990), *reh'g and clarification denied and prior orders modified*, 51 FERC ¶ 61,195 (1990).

[34] Kern River Gas Transmission Company, 50 FERC ¶ 61,069 at 61,150 (1990) (Kern River I), *reh'g and clarification denied and prior orders modified*, 51 FERC ¶ 61,195 (1990) (Kern River II), *compliance filing modified and accepted*, 53 FERC ¶ 61,172 (1990) (Kern River III).

because it represents the bare minimum return over which equity capital should receive a premium because of its higher inherent risks. Equity capital is generally riskier than debt because the interest and principal repayment on debt is contractually guaranteed; equity capital has no such guarantees.

The upper end of the range of returns on equity is determined by a DCF analysis of a proxy group of eight natural gas transmission companies. These companies are used because they are publicly held. Because of recent mergers and acquisitions in the gas industry, most pipelines are subsidiaries of other companies. Since the DCF methodology is based on market data such as stock prices and dividend yields, we used in our DCF analysis the estimated returns of a proxy group of natural gas companies which have stock traded in the market.[35]

The DCF analysis resulted in a range of returns of 11.0 percent to 15.8 percent, with a median return of 13.02 percent and an average of 13.12 percent. The DCF-derived range of equity returns for the eight proxy group companies and the Baa utility debt cost, discussed earlier, produces a zone of reasonableness for gas pipelines of 10.13 percent to 15.8 percent.

We note that our recommended 12.75-percent rate of return on equity is within the DCF range of the proxy group. In addition, we find that this rate of return based on a 30-percent equity ratio is reasonable when compared with the returns approved by the Commission for other similar certificated pipelines and when differences in capital structure and rate design

---

[35] The eight companies selected are: Burlington Resources, Coastal Corp., Columbia Gas, Enron Corp., Panhandle Eastern Corp., Sonat Inc., Transco Energy, and Williams Cos., Inc. These companies were chosen also because they are predominantly transmission companies deriving a large percentage of their revenues and/or operating income from gas transmission operations. The median equity ratio of the eight companies is approximately 40 percent, based on 1989 year-end capitalization.

for those pipelines are considered.[36] Moreover, it is in line both with returns allowed by the Commission for existing pipelines[37] and with estimated investor expected returns for industrial companies, as represented by the Standard & Poor's 500 (S & P 500) index.[38]

e. *Exclusion of Amortization Costs*

PGT improperly included in its cost-of-service costs related to the amortization of debt expense. The Commission reflects

---

[36] For example, the Commission allowed 14.00 percent on a 30 percent equity ratio in both WyCal, *supra*, and Green Canyon Pipe Line Company, 47 FERC ¶ 61,310 (1989). However, in both of these cases, the optional certificate pipelines utilized a modified fixed-variable (MFV) rate design as opposed to the enhanced fixed-variable (EFV) rate design proposed by PGT, which entails less risk to common equity. Additionally, the Tennessee portion of the Iroquois project received a 12.25 percent return on equity based on a rate design which assigned approximately 12 percent of total fixed costs to the commodity charge. In this project, the EFV rate design assigns approximately 18 percent of total fixed costs to the usage charge. Because of the greater percentage of fixed costs assigned to the usage charge, PGT faces higher risk than Tennessee. Thus, a higher return on equity for the expansion project is appropriate.

[37] The recommended rate of return on equity for PGT is also comparable to the returns allowed existing pipelines. Based on a DCF study, the median expected investor return for the pipelines in the proxy group is 13.02 and the average 13.12 percent, on an approximately 40 percent equity ratio and an MFV rate design. The 12.75 percent rate of return recommended for PGT reflects that the lower risk of the EFV rate design is somewhat offset by a higher risk posed by its lower 30 percent equity ratio.

[38] Based on a DCF analysis, the rate of return on equity for the S & P 500 is estimated at 11.50 percent. This is the sum of the average dividend yield and projected growth in dividends. The average dividend yield during 1990 for the S & P 500 through October was 3.7 percent, as shown in the S & P "Outlook" dated November 7, 1990. The median 5-year projected growth rate for the S & P 500 was 7.8 percent, as reported in the October 1990 monthly summary data published by the Institutional Brokers Estimate System. The 11.50 percent return estimated for industrials is lower than the return recommended for PGT. However, industrials had a much thicker equity ratio of about 65 percent in their 1989 capitalization than the 30 percent equity ratio in PGT's capital structure.

such costs in the debt cost portion of the overall return underlying the rates it authorizes. In order to be consistent with the Commission's general policy regarding expenses that are related to the issuance of debt securities, we have excluded such expenses from PGT's cost of service in the calculation of the initial rates provided herein.

3. *Force Majeure*

Article 4.1 of PGT's Pro Forma Tariff provides:

> *No cause whatsoever, including without limitation the failure of PGT to perform* and the causes specified in Paragraph 12.1 of the General Terms and Conditions, shall relieve Shipper from its obligation to make payments due including the payments of Reservation Charges. [Emphasis added]

The language is too restrictive and onerous on the shippers since it requires them to pay for the transportation service under any *force majeure* circumstances and since it has the effect of guaranteeing revenue. In addition, our review of the tariff reveals no provision for the shippers to negotiate this onerous requirement.

In *Kern River I*, we rejected a revised tariff provision proposed by Mojave Pipeline Company (Mojave) which would provide that the shipper's obligation to pay the reservation charge to be irrevocable and unconditional, "unless transporter and a shipper agree otherwise". We stated:

> The Commission's optional certificate procedures disallow any provisions which have the effect of guaranteeing revenue. Accordingly, such provisions cannot be incorporated into the tariff. The Commission believes that inclusion of this provision in the tariff is not in the public interest because it provides Mojave with an unfair advantage in the negotiating process in that the shipper is placed in the position of having to negotiate for the removal of what could otherwise be construed to be a standard provision.

> Accordingly, the Commission is requiring Mojave to remove these provisions from the tariff in their entirety. Mojave is instructed to replace these provisions with language that specifies that the payment of the reservation fee under circumstances of nondelivery is negotiable and subject to agreement by the shipper.[39]

Although PGT (a Part 284 pipeline) is not an optional certificate pipeline, the above language is nonetheless applicable for the reasons stated above. Accordingly, PGT is instructed to revise its tariff consistent with the above discussion.

4. *Capacity Allocation*

a. *Background*

As noted previously, in its December 1988 application, PGT proposed to provide a total of 600 MMcf per day of annual average firm transportation service for Southern California utilities (utility customers or utility shippers) and identified utility market demand for firm transportation of between 560 and 710 MMcf per day. PGT also proposed to provide a total of 150 MMcf per day of firm transportation service from Kingsgate to Stanfield and other points in the Pacific Northwest, based on a utility market demand for firm transportation of up to 253 MMcf/d by Pacific Northwest and Intermountain shippers.

In its February 28, 1990 response to data requests, PGT explains that its original intent was to subscribe fully the capacity of its expansion project to gas, electric and combination utilities, or their affiliates. As of March 9, 1989, when PGT announced its open season, PGT had succeeded in obtaining letters of interest or intent totalling 350 MMcf per day from utility shippers. Consistent with the original project design of an annual average capacity of approximately 600 MMcf per day to California, PGT proposed to provide no less than 250 MMcf

---

[39] 50 FERC at 61,155.

per day (annual average) for service to California to shippers requesting capacity via the open season.

PGT required its utility customers to firmly establish their requests for capacity by executing precedent agreements for capacity by April 24, 1989. Further, in its response to data requests, PGT states that "the capacity reserved by the utility shippers via a letter of intent or interest in Docket No. CP89-460-000 [the original filing] was secured by executing a precedent agreement prior to PGT's allocation of capacity to open-season shippers. Thus, the utility shippers were given the opportunity to execute precedent agreements to retain their priority for capacity provided that they executed their agreements prior to PGT's awarding capacity in its open season. Further, PGT did not require these shippers to pay a reservation fee for firm service since the requirement had not been a condition of PGT's original marketing program to utilities. Therefore, PGT executed precedent agreements with the following utility shippers prior to the open season and without requiring a reservation fee commitment: SoCal Edison for 200 MMcfd; SDG&E for 100 MMcfd; and the City of Long Beach for 50 MMcfd, for a total of 350 MMcfd (annual average) by April 24, 1989.[40]

In contrast, during its "open season" conducted from April 26 through May 2, 1989, PGT made available only 250 MMcfd to the "open season" shippers and limited the initial queue for service to a total of no more than 50 MMcfd per corporate entity including affiliates, for which the shippers had to bid. These requests were queued according to the present value of the reservation charge per Mcf of capacity the shipper was willing to pay for the term of the service requested.

During negotiations, PGT explains, it became clear that the California shippers preferred a year-round service to the winter-peaking type service originally contemplated. For this

---

[40] In PGT's settlement with its expansion shippers, the shippers agreed to pay the same rates.

reason, PGT decided to redesign the expansion project and provide the year-round service requested by its shippers for service to California. In addition, PGT contends that its parent company, PG&E, in its overall system planning, decided that it required an additional 100 MMcfd of capacity on the Expansion Project to meet its requirements. The end result was that PGT redesigned its project with an allocation of 430 MMcfd to utility shippers (Long Beach dropped 20 MMcfd) for service to California and 325 MMcfd to the "open season" shippers.

b. *Technical Conference*

(1). *PGT's Position*

At the technical conference, PGT described its "phased" approach of allocating its capacity. Basically, in phase I, PGT states that it marketed capacity to utilities only; in phase II, it held an "open season" for the remaining capacity; and in phase III, it redesigned the project to accommodate seasonal service and to create additional capacity which was allotted to PGT's parent company, PG&E. According to PGT, this was done even in the face of remaining requests for service which had not been satisfied and without the requirement that PG&E take part in the bidding process. PGT acknowledged the unmet requests but stated that the potential shippers who did not obtain capacity simply did not submit a high enough bid or requested a type of service which was not available (deliveries at Malin rather than Kern River Station). PGT stated that its "open season" followed the standard set by WyCal.

(2). *Opponents' Position*

Bonus Gas Processors of Calgary (Bonus) stated that it requested service for 50 MMcf/d from PGT as early as June 1987. However, Bonus stated, when PGT filed its expansion project, it notified Bonus that the expansion project was already fully subscribed. According to Bonus, it again requested service during PGT's open season in March 1989. However, Bonus stated that it requested a receipt point at Malin. Bonus

claimed that it has over 3 Bcf of gas supply available to supply 60 MMcf/d at Malin over a 15-year period.

In its response to Bonus, PGT said it could not provide service to certain customers like Bonus because they requested different routes or configurations and were subsequently rejected. PGT stated that it had designed its system based on where the market is (*i.e.*, Southern California).

Bonneville Fuels noted that it too was unable to obtain capacity on the expansion project. PGT, in a later discussion, explained that Bonneville Fuels did not obtain capacity because of the present value of its bid (*i.e.*, the amount of the reservation charge multiplied by the contract term had a lower present value than the bids of the shippers who were queued above them). (Transcript at 309)

Several capacity allocation opponents question the seriousness of commitment of certain customers who signed "exclusive" precedent agreements for the expansion capacity with PGT.[41] The opponents state that several customers have signed "exclusive" precedent agreements which basically prohibit parties to such agreements from contracting with other transporters at some later date. Others, the opponents state, also signed agreements that have a "regulatory out" and/or "supply out" provisions.[42]

---

[41] Altamont describes the purpose of an "exclusive" precedent agreement as agreements that "were designed specifically . . . to *control* the 'continued shopping' around for new firm capacity that has made it difficult to establish any market solution." Altamont's August 27, 1990 motion to dismiss application, or in the alternative, for an evidentiary hearing and discovery procedures at 37, *quoting* prepared CPUC testimony of Paula G. Rosput, Docket No. I.88-12-027 at 7.

[42] For example, in its August 27, 1990 motion to dismiss PGT's application, or in the alternative, for an evidentiary hearing and for discovery procedures, Altamont describes the "kick-out" provisions as follows:

> These provisions typically provide that the agreements may be terminated if: (1) a regulatory authorization is not obtained in a form satisfactory to the shipper; or (2) a shipper is unable to secure a gas supply arrangement that meets with its [PGT's] approval.

Altamont believes that PGT has used its market power to extract unduly onerous provisions from its shippers. Altamont also pointed out that the agreements require the shippers to wholly support the project. For this reason, Altamont alleges that PGT used its market power to "lock up" the market and then negotiate, thereby preventing market forces from interacting. SoCal Edison claimed, in discussing the shippers' commitment, that it would like to sign a contract with PGT for more than 30-years, whereas PGT wants to limit the contract to 30-years.

c. *Capacity Allocation Conclusion*

Based on the evidence outlined above, we conclude that PGT has unduly discriminated against nonutility shippers in its phased approach to the allocation of initial capacity:

(1) PGT marketed its expansion capacity to a select group (utility shippers) and in the face of numerous complaints, allowed that select group "first pick" of capacity before the "open season" and without a bidding process.

(2) PGT then made the remaining capacity available to the open season shippers but limited the amount available to each shipper and required a bidding process not required of all shippers. PGT required a reservation fee of these "open-season" shippers.

(3) PGT protected the market of its parent company, PG&E, from competition by allowing deliveries of expansion capacity to Kern River Station only, thereby by-passing the market area of PG&E. (See discussion in subsection d.)

(4) PGT redesigned its proposal to accommodate its parent company, PG&E, with 100 MMcfd of capacity *after the open season* when all requests for capacity had not been satisfied and without requiring PG&E to participate in the bidding process.

In addition, based on our review of PGT's responses to staff's data request, we note that PGT would require its open-season shippers to accept a minimum contract term of 15 years and a maximum of 30 years which was not required of the utility shippers. Also PGT would require an open-season shipper to make a prepayment or an irrevocable letter of credit equal to the cost of providing service for the first year.

Besides the above findings, we have additional concerns. First, as noted previously, following the technical conference, PGT met with two of the unsatisfied shippers, Bonneville and Bonus, and was able to meet the demands of these parties which resulted in the withdrawal of their opposition. However, the Commission has no way of knowing whether all the requests for capacity have been satisfied or addressed. For example, the Commission has not heard from Windward since it filed its original protest complaining of not being able to secure capacity on PGT's expansion system. In addition to Windward, the California Industrial Group (Industrials) challenged PGT's purported settlement on grounds that the PGT proposal is primarily intended to serve only the Southern California markets, thereby denying expansion shippers (other than PG&E) reasonable access to Northern California.

Secondly, we do not know whether the expansion shippers themselves are satisfied with their capacity allocation. We note, for example, that the expansion shippers were required to sign a precedent agreement with PGT which obligates them to support PGT's filing before all regulatory agencies.[43] Thus, if a shipper were to file a complaint with the Commission that it did not get all the capacity it wanted on PGT's expansion,[44] the

---

[43] The precedent agreement states: "Shipper shall support, participate with and assist Transporters [PGT and PG&E] in their efforts to submit all necessary applications and to obtain the necessary regulatory authorizations for their proposed expansion project. . . ." It also states: "Shipper shall act in a good faith manner and shall take no action inconsistent with its obligations under this Agreement. . . ."

[44] As noted before, the "open season" shippers were restricted in the amount of capacity they could select.

shipper may be breaking its agreement with PGT and could lose the capacity it obtained on the expansion project. For this reason, we cannot conclude that silence on the part of the expansion shippers means that they are satisfied with the capacity allocation.

To remedy unduly discriminatory practices noted above, we will require PGT to establish new open-season procedures for the initial allocation of all of the expansion capacity, and to include such procedures in its tariff. This means that PGT must renegotiate the precedent agreements which it has already entered into. The Commission believes that renegotiation of these contracts is necessary because the evidence indicates that PGT has not prioritized the requests for service in accordance with the Commission's previous orders—to the detriment of other potential shippers such as the proposed open-season shippers.[45]

In addition, these procedures must ensure that capacity is allocated on a nondiscriminatory basis. In this regard, we note that while we approve of PGT's present value methodology in the allocation of capacity,[46] we do not mandate such a scheme or conclude that this is the only acceptable capacity allocation mechanism for all certificate cases. On the contrary, in *Delta Pipeline Company,*[47] we stated that:

> recent Commission decisions recognize the need for optional certificate pipelines to have the flexibility to select and implement other capacity allocation methods based on their reading of the market. The Commission found open seasons and first-come, first-serve to be consistent with Order Nos. 436 [FERC Statutes and Regulations, Regulations Preambles 1982-1985 P 30,665] and 500

---

[45] *See, e.g.*, Wyoming-California Pipeline Company, 50 FERC at p. 61,178, where we imposed the same remedy after finding that the capacity allocation procedures were unduly discriminatory.

[46] See *id.* at p. 61,176, where we approved a similar methodology for the allocation of capacity.

[47] 52 FERC P 61,004, at p. 61,050 (1990).

> [FERC Statutes and Regulations, P 30,761], and to be generally acceptable methods of allocating capacity, if implemented in a nondiscriminatory manner.

Although PGT is not an optional certificate pipeline, the language is applicable here.

In light of the above, we believe that it would be useful for the Commission to review PGT's revised sheets prior to issuing its final order in this proceeding. Accordingly, PGT will be required to submit revised pro forma tariff sheets, as recommended herein, within 30 days after the issuance of this instant preliminary determination.

The revised open-season tariff provisions should ensure that no undue preference is accorded to any PGT affiliate.

e. *PG&E's Delivery Point at Kern River Station*

PG&E and PGT propose to charge a single rate to all expansion shippers for the transportation of gas from Kingsgate, British Columbia, through Malin, Oregon—where the expansion volumes leave the PGT system and flow into the PG&E intrastate system—to Kern River Station near Bakersfield, California. Once the expansion volumes are delivered to Kern River Station, each Northern California shipper would have to make arrangements for the transportation back North for final delivery. Certain Northern California shippers (like Bonus) would have to pay this rate, even though they may wish to take receipt of expansion gas in Northern California (near Malin, Oregon) before the gas flows into the PG&E system.[48] Consequently, if a Northern California shipper desires to receive its Canadian gas at a Northern California delivery point near Malin, that shipper would have to pay for PG&E to transport the gas downstream, past the Malin delivery point,

---

[48] In this regard, we note that the service agreement proposed in the *pro forma* tariff (which are agreements among PGT, PG&E, and the shippers) provides for PGT to transport volumes from the International Boundary or from Stanfield, Oregon to Malin, Oregon for delivery.

into Southern California at the Kern River Station, for redelivery back upstream to a Northern California delivery point on the PG&E system.[49]

PGT defends this proposal by stating that the single rate is intended to recover the cost of the facilities necessary to physically move the incremental volumes on the expansion project to Southern California. According to PGT, the proposed rate which the expansion shippers will be charged for this transportation on PG&E is before the CPUC, which has jurisdiction, and will be reviewed as part of PG&E's expansion proposal before that agency. Notwithstanding that fact, several parties have raised the issues of: (1) whether the single rate transportation proposal for the unnecessary transportation is unduly discriminatory, and (2) whether the Commission should compel PGT (on behalf of Northern California shippers) to allow for deliveries in Northern California as opposed to allowing PGT to require transportation downstream to the Kern River Station and back upstream to a Northern California delivery point.

PGT claims that the single rate was proposed because this is the only way that the expansion to Kern River Station would be economic under its financing plan. In order to finance building the pipe from Malin down to Southern California, PGT stated that it was necessary to require the shippers to pay for such transportation.

We find PGT's arguments unpersuasive. If a pipeline is designed to deliver 755 MMcf/d to Southern California, it is axiomatic that rates must recover costs for the pipeline to Southern California. However, there should be rates and additional delivery points available for shippers who desire some portion or all of their volumes to be delivered in Northern California before the gas reaches Kern River Station.

---

[49] For example, at the technical conference, Bonus explained that it had requested a receipt point at Malin for its volumes but had been rejected because such receipts were only allowed if the gas is first transported through the Kern River Station for redelivery in Northern California.

Despite PGT's response, we have several concerns here. First, we object to PGT's requirement for its California shippers that the expansion volumes must be transported down the state to Kern River Station, where the customers in Northern California will then be forced, not only to pay for this unnecessary haul to Bakersfield, California, but also to arrange for and pay for transportation back up the state on PG&E's intrastate pipeline system. Secondly, it is not clear from the record whether PG&E would offer transportation to competitors in its market area at the Malin delivery point. At one point in the technical conference, PGT noted that the Northern California customers could simply pay for the unnecessary transportation and physically receive the gas at a more convenient Northern California point. Third, we are concerned about the possibility that PGT's price proposal may be an illegal tying arrangement between interstate and intrastate transportation.

Given these concerns, and since we have already required PGT to renegotiate its existing expansion contracts when it establishes new procedures for the initial allocation of expansion capacity, we will require PGT to remove the discriminatory language requiring any intrastate transportation from its tariff and its precedent agreement. For all interstate transportation authorized herein, the California delivery point must be Malin, the terminus of PGT.[50]

f. *Market Power/PGT Precedent Agreements*

PGT has provided copies of its precedent agreements with its shippers. Several parties challenge several provisions of those precedent agreements. Article II of the precedent agreements provides the following language:

---

[50] We note that PGT's *pro forma* Rate Schedule T-3 and its *pro forma* service agreement already provide for PGT to transport volumes from Kingsgate, British Columbia or Stanfield, Oregon to Malin, Oregon for delivery. However, the precedent agreements (which are agreements among PGT, PG&E, and the shippers) provide for transportation on a firm basis from Kingsgate, British Columbia, to Kern River Station, California.

> 2(a) Shipper shall support, participate with and assist Transporters [PGT and PG&E] in their efforts to submit all necessary applications and to obtain the necessary regulatory authorizations for their proposed expansion project and shall keep Transporters informed of all significant events that occur in regard to the above-referenced activities. Shipper shall act in a good faith manner and shall take no action inconsistent with its obligations under this Agreement or with the effective performance of the Transporters' duties and obligations under this paragraph. (Emphasis added.)
>
> 2(b) Shipper hereby makes an exclusive commitment to the capacity requested in the incremental expansion in the amount set forth in Appendix A. (Emphasis added)

The opponents of these provisions allege that PGT has used its "market power" to force prospective shippers to support only the PGT project to the exclusion of other projects and not take any action inconsistent with PGT's obligation under this agreement.

We do not believe that such requirements are unreasonable given the new competitive environment. In this regard, we note that the precedent agreements do not prohibit the shipper from signing with another transporter in addition to PGT; they only require that the shipper be "serious" about its commitment to the project by not signing with another project for the same volumes.

In addition, the precedent agreements also contain the following language:

> In the event approvals and/or authorizations of any or all of the applications or conditions specified in Article III, 3(a), cannot be obtained, in form and substance satisfactory to the appropriate Parties, and *all administrative appeals, if any, are exhausted,* either party hereto may cancel this Agreement by giving the other party ninety (90) days prior written notice. . . . (Emphasis added)

Several opponents allege that the above language is too restrictive. They claim that the provision prohibits shippers from withdrawing from the project until an order on rehearing has been issued. However, we note that other language in the precedent agreements provides that the parties have the opportunity to accept or reject various authorizations and that the preceding conditions to entering into a firm transportation agreement shall be concluded to "the mutual satisfaction of the Parties". Hence, we do not agree that the shippers are unreasonably bound by the precedent agreements.[51]

As for PGT's market power, there are currently two ways to get Canadian gas to California: via the Alberta-PGT route and over the Northwest system and the facilities of El Paso Natural Gas Company (El Paso) for delivery to Southern California. However, we note that several parties have filed applications for authority to build new facilities to move both U.S. and Canadian gas into California. Some of these new proposals would require upstream transportation by Altamont or Northwest. Since 1988, the Commission has issued Kern River, WyCal, and Mojave five certificates to construct projects to serve California markets. Given the availability of these projects, we cannot conclude that PGT's market power prevented the expansion shippers from signing up with other projects.

g. *PGT's Market*

PGT's expansion project is fully subscribed by shippers who have agreed to pay a reservation fee.[52] At the technical conference, these shippers voiced their support for the project and subsequently provided the Commission with detailed market data which reveals the planned use for the supplies.

---

[51] We note that one of the Canadian shippers at the technical conference stated that it had signed a precedent agreement with PGT and with another pipeline project without incident and that PGT had not restricted it in any way from participating in another project.

[52] The reservation fee includes 90% of the project's fixed costs.

In addition, PGT provided market data which reflects that about one-third of the project will be used to satisfy "new" market demand in California and that the remainder of the volumes will be used to displace current supplies on existing pipelines. Consequently, capacity on those existing lines will be "free[d] up", thus providing the market access to presently flowing U.S. supplies. In light of the CPUC's finding that the California market requires an additional 900 MMcf/d of natural gas by 1995, the new supplies on PGT's expansion along with the U.S. supplies available from this "free up" of existing capacity should provide a competitive market environment for domestic and Canadian supplies.

h. *California Gas Report*

According to the 1990 California Gas Report (Report), Southern California gas utilities expect continued growth in the residential market, as well as in the associated service-oriented industries in the commercial market. These markets, along with small industrial customers, comprise the core market. The remaining customers, the alternate fuel capable customers, make up the noncore market. The Report reflects a slight decrease in California supplies, which is replaced by out-of-state supplies for Northern California. For Southern California, the Report shows no decrease of California supplies and an increase in out-of-state transportation of supplies to meet Southern California requirements. The Report shows growth in California's requirements as follows:

California Gas Requirements
Growth in MMcf/d

	1990-1995	1990-2000
Northern California . .	223	446
Southern California . . .	371	693
Total California	594	1139

These figures are somewhat more conservative than the findings of the CPUC discussed above which estimated new market

in the range of 900 MMcf/d by 1995, but the findings shown here do confirm the fact that there is expected growth in the California natural gas market.

Gas Supply

The proposed PGT expansion is a transportation-only project. Since PGT will not be purchasing or selling any of the gas transported, PGT contends that the gas supply data traditionally required for a section 7(c) application are not strictly applicable in this case. In this regard, PGT asserts that all of the expansion shippers have stipulated in the settlement that a sufficient supply of Canadian gas exists to support the issuance of a certificate for this project. Also, PGT submits that no intervenor has questioned the adequacy of the Canadian gas resource base to support the expansion project as a material issue. On this issue, we note that in a data response dated July 27, 1990, PGT's shippers provided the names of some of their suppliers.

Based upon the most recent estimates of the NEB, the Alberta Energy Resources Conservation Board (AERCB), Energy, Mines & Resources Canada (EM&R), the Alberta Department of Energy, the Alberta Petroleum Marketing Commission, the American Gas Association, and the Canadian Petroleum Association, PGT states that established reserves in the Western Canadian Sedimentary Basin remain at the 70 Tcf level. PGT states further that EM&R's latest analysis ("2020 Vision: Canada's Long Term Energy Outlook" Winter 1990) shows Canada's gas production capability at about 4.5 Tcf per year in 1988, thus reflecting a surplus deliverability of about 1.1 Tcf per year. Additionally, PGT notes that the latest EM&R reference case shows Canadian domestic demand increasing by 1.9 percent per year and exports growing from the current level of about 1.3 Tcf per year to 2.1 Tcf per year in 2001. PGT also notes that despite this tremendous growth in demand, EM&R projects that the deliverability surplus will persist throughout

the period to 2020, averaging almost 1 Tcf per year and never falling below 600 Bcf per year.[53]

Even though there appear to be sufficient supplies of Canadian gas, we are concerned that the expansion shippers may not be able to contract for sufficient supplies to support the project. Many expansion shippers are still negotiating with their suppliers and have been unable to provide contracts and have only provided names of suppliers on a confidential basis.[54] However, we note that article III, section 3(a) of PGT's standard precedent agreement provides that "[t]he Parties agree to enter into a definitive firm Gas Transportation Agreement subject to the following conditions precedent." Among those conditions, section 3(a)(iv) requires:

> the execution by Shipper of definitive Canadian gas supply and Canadian transportation agreements in a form and substance satisfactory to Shipper, along with receipt of satisfactory United States and Canadian regulatory approvals associated with such gas supply and transportation. . . . (emphasis added)

The Commission interprets this language to mean that a shipper cannot enter into a contract for transportation with PGT until it has executed its contract(s) for supply and has received regulatory approvals.

Given the incomplete supply arrangements of PGT's shippers, we will condition the certificate in this proceeding to provide that PGT bear the responsibility for any shortfall in cost recovery if the import authority ultimately granted by DOE/FE to the shippers (or any shipper) proves to be of shorter duration or a lower volume than that necessary for the recovery of the costs of the facilities proposed herein. PGT shall be prohibited

---

[53] We note that the PGT Expansion volumes would amount to approximately 328.5 Bcf per year, which is only about one third of this surplus of 1 Tcf.

[54] A listing of the nonconfidential shipper suppliers is provided in Appendix F to this order.

from shifting any of the costs associated with the facilities and services proposed onto any of their other customers unless it is proved that the customers are using the facilities.

i. *Northwest's Deliveries*

PGT proposes to transport on behalf of the following Pacific Northwest customers: Cascade, IGI Resources, Northwest Natural, and Washington Water Power.

Each of the Pacific Northwest shippers may obtain capacity for the PGT expansion volumes by displacing presently flowing volumes through the exercise of their flexible receipt point option on Northwest. Thus, although they apparently want expansion capacity on Northwest, the Pacific Northwest shippers are not necessarily dependent on an expansion of Northwest to receive downstream transportation of their respective PGT Expansion volumes.

The Commission notes, however, that PGT proposes to receive 62 MMcf per day of gas at Stanfield on behalf of two of the California shippers, BP Canada and Williams. The 62 MMcf of gas received at Stanfield would require upstream transportation by Northwest. Since neither of these shippers currently has firm capacity on Northwest's existing system, Northwest agreed to file an application for authority to expand its system to accommodate the transportation of the 62 MMcf of gas. On December 31, 1990, Northwest filed an application for a certificate of public convenience and necessity in Docket No. CP91-780-000 which includes the construction of facilities to provide the transportation of the 62 MMcf per day of gas to PGT at Stanfield. We will authorize PGT to construct its facilities to receive the 62 MMcf/d from Northwest. However, the authorization does not prejudge the application in Docket No. CP91-780-000. Whether or not the capacity constructed by PGT under this authorization for transportation of the gas to be supplied by Northwest at Stanfield will be considered used and useful, and thus subject for inclusion in PGT rate base, will be subject to our decision in that proceeding.

j. Upstream Canadian Facilities

The proposed facilities in Canada will consist of three segments of 42-inch O.D. pipeline totalling 48.1 miles, new compression totalling approximately 36,000 hp, and ancillary facilities. The new pipe will be located between the existing pipelines of Foothills Pipe Lines (South B.C.) Ltd. (Foothills) that were installed parallel to Alberta Natural Gas Company's (ANG) system in 1981 and/or pipeline loops installed by ANG in the 1970 looping program. These three new pipeline segments will essentially complete the Foothills pipeline in South British Columbia. The Foothills pipeline will operate on an integrated basis with the ANG system. New pipe will extend to the Canada-U.S. International Boundary to tie-in with a proposed new pipeline loop of PGT.

On May 31, 1990, Alberta Natural Gas Company Ltd. (ANG) filed with the NEB its application for related Canadian facilities for PGT's Expansion. Also, on May 31, 1990, Foothills Pipe Lines Ltd. (Foothills) made its application with the Canadian Northern Pipeline Agency to construct facilities to transport volumes related to the PGT Expansion. Hence, all Canadian applications for upstream facilities relating to PGT's Expansion volumes have been filed.

We will, however, require PGT to bear the cost responsibility of any shortfall in cost recovery should Foothills or ANG be unable to fully construct facilities to provide full deliveries of PGT's expansion volumes. In that event, PGT is explicitly prohibited from shifting any of the increased costs resulting from the reduced Foothill's or ANG's volumes onto any of its customers.

k. Export/Import Authorizations

Since PGT will only be transporting the expansion volumes, the expansion shippers, and not PGT, are responsible for obtaining the necessary export and import authorizations for the Expansion volumes. In response to the Commission's order of May 1, 1990, which convened the technical conference

and required PGT to file information necessary to complete its application (Ordering Paragraph B), the expansion shippers filed data which showed that 17 out of the 20 shippers either already have or have filed for import authorization with the Office of Fossil Energy (OFE). Also, approximately 15 of the 20 shippers either already have or are in the process of filing for Canadian National Energy Board (NEB) export authorization (the NEB stated that the letters of intent it received would be considered incomplete applications). The fifteen shippers also have filed letters of intent with the Alberta Energy Resources Control Board (AERCB) in Alberta, Canada to file for removal permit authority.

In addition, the record reflects that in article III of PGT's precedent agreement (*i.e.*, where the parties agree to enter into a definitive firm gas transportation agreement), one of the conditions of entering such agreement is the shipper's "receipt of satisfactory United States and Canadian regulatory approvals associated with such gas supply and transportation". We interpret such language to include import and export authorizations.

A. The Altamont Pleadings

Altamont has filed numerous pleadings in this proceeding,[55] stating that a comparative hearing is warranted under the *Ashbacker*[56] for the Altamont and PGT projects since they are

---

[55] For example, Altamont filed a motion for the establishment of comparative procedures on June 25, 1990; a motion to dismiss PGT's application on July 10, 1990; comments on the PGT technical conference on July 27, 1990; and a motion to dismiss or alternatively hold evidentiary hearings on August 27, 1990. For the reasons discussed above and other sections in this order, Altamont's motions are denied.

[56] Ashbacker Radio Corporation v. FCC, 326 U.S. 327 (1946) (holding that "where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.)

competing projects.[57] We will deny Altamont's requests for a comparative hearing.

First, the Commission's optional regulations do not contemplate comparative hearings between an optional certificate application and a traditional section 7 application. *See* 18 C.F.R. § 157.103(a). In *CPUC v. FERC*, 900 F.2d 269, 278 (D.C. Cir. April 3, 1990), the court upheld our interpretation, holding that *Ashbacker* did not require a comparative hearing as between applicants under the optional certificate procedures and traditional section 7(c) procedures. The court reasoned that optional certificate applicants and traditional section 7(c) applicants are under two separate tracks for certification.

We note as well that Altamont has not established that Altamont and PGT will serve the same market. As an optional certificate applicant, Altamont (unlike PGT which is a traditional section 7(c) applicant) is not required to file extensive market data. Moreover, PGT has explicitly stated that it does not propose to serve the EOR market, which is to be served by Kern River and Altamont. Nor does Altamont propose to serve the Pacific Northwest, which PGT will serve.

Finally, the PGT expansion project and the Altamont project are simply at different developmental stages. It would not be fair to PGT and its customers to hold up PGT's project to allow Altamont to develop a market for its project. Unlike Altamont, PGT is fully subscribed, its shippers are proceeding to file for necessary authorizations, and its schedule is already determined. Altamont is still at the developmental stage of marketing its project and signing up customers.

B. *NGA Section 3 Authorization and Presidential Permit*

Before facilities are sited, constructed, operated, and maintained at the U.S.-Canada border, the applicant must

---

[57] In an order issued January 17, 1991 (Altamont Gas Transmission Company, Docket No. CP90-1372-000 *et al.*, 54 FERC ¶ 61,028, the Commission issued Altamont a certificate under our optional procedures for the construction of a new pipeline system.

obtain appropriate NGA section 3 authorization[58] and a Presidential Permit.

In 1977, the Department of Energy Organization Act[59] transferred jurisdiction to regulate the import and export of natural gas to the Secretary of Energy. The Secretary subsequently delegated to the Administrator of the Economic Regulatory Administration, now the Assistant Secretary of Energy, Office of Fossil Energy (DOE/FE), the responsibility to authorize imports, while the Commission was delegated regulatory responsibility over issues pertaining to siting, construction and operation of facilities, and the place of entry for imports that involve construction of new domestic facilities. The FERC also retains its functions under sections 4, 5 and 7 of the NGA.[60]

The issuance of a Presidential Permit requires that the views of the Secretaries of State and Defense be solicited before a permit can be issued.[61] On December 5, 1989, the Commission sent copies of letters to the Secretaries of State and Defense requesting their comments and recommendations

---

[58] Section 3 provides that

> [N]o person shall ... import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed ... importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate. 15 U.S.C. § 715b.

[59] 42 U.S.C. §§ 715(b) and 7172(f).

[60] Delegation Order Nos. 02045-11 and 0204-112. *See also*, New Policy Guidelines and Delegation Orders From the Secretary of Energy to the Economic Regulatory Administration and Federal Energy Regulatory Commission Relating to the Regulation of Imported Natural Gas, 49 Fed. Reg. 6684.

[61] 61 Yukon Pacific Corporation, 39 FERC ¶ 61,216, at p. 61,759 (1987).

on the terms of the draft Presidential Permit.[62] On December 21, 1989 and February 15, 1990, respectively, the designees of the Secretaries of State and Defense responded that they had no objections to the issuance of the permit.

Pursuant to our authority under Executive Order Nos. 10485 and 12038 and the Secretary of Energy's Delegation Order No. 0204-112, we intend to grant NGA section 3 authorization and issue a Presidential Permit for the siting, construction, operation, maintenance and connection of the facilities described in the applications filed in Docket No. CP90-1-000, pending a final order in these proceedings addressing environmental matters as part of a complete record in the case.

V. Motions

A. *Requests for an Evidential Hearing and/or Discovery*

We find that under the appropriate legal standards, based upon the current record, there are no issues of material fact in dispute that cannot be resolved on the record. An evidentiary hearing is required only if there exists a genuine issue of material fact. Mere conjecture does not create a genuine issue of material fact.[63] Similarly, based upon the current record, we find that there is no need for discovery.

B. *Motion for Proposed Transcript Corrections*

On July 27, 1990, Amoco filed proposed technical conference transcript corrections. Since no opposition to the motion has been filed, the motion is granted.

C. *Motion for Official Notice*

On October 19, 1990, the CPUC filed a motion requesting the Commission to take official notice of the CPUC Decision

---

[62] The terms of the draft Presidential Permit are found in Appendix F to this order.

[63] See Delta Pipeline Company, 52 FERC 61,004, at p. 61,051; and Citizen for Allegan County, Inc. v. FPC, 414 F.2d 1125, 1128 (D.C. Cir. 1969).

No. 90-09-89, issued September 25, 1990. The CPUC states (at 1-2) that:

> questions have apparently arisen as to whether the CPUC's rulemaking proceeding in which that decision was issued signifies an alteration in the CPUC's view, articulated in CPUC Decision No. 90-02-016, that there is a substantial near- and long-term need to serve California's requirements. Official notice is sought to apprise the Commission of the fact that the CPUC has in no way altered its view, as well as to apprise the Commission of new developments in state regulation.
>
> The CPUC persists in the view that new interstate pipeline capacity to California is needed and continues to support the Commission's immediate certification of the applicant's [PGT's] interstate pipeline expansion proposal herein, consistent with the requirements of federal law.

On November 2, 1990, Altamont filed a response in opposition to the October 19 motion of the CPUC. Altamont states that it does not oppose the submission of evidence in this proceeding, nor does it seek to deny the Commission access to all information relevant to the matters at issue. Indeed, Altamont contends, it has urged the Commission, on a number of prior occasions, to convene an evidentiary hearing at which a full record can be developed regarding the numerous genuine issues of material fact which are presented by PGT's application. It asserts that the Commission should not take official notice of selected material without providing all parties with a full opportunity to test the validity of such material and to present related evidence.

According to Altamont, it is concerned that the CPUC has elected to express its support for PGT's portion of the PGT/PG&E expansion project, while it is still actively considering PG&E's application to construct PG&E's portion of the very same project in California. Altamont claims that the CPUC's position in this regard not only raises grave concerns as to whether the CPUC has prejudged PG&E's application but also

casts doubt on the propriety of taking official notice of any of the CPUC's decisions.

As we interpret its motion, the CPUC does not request that the Commission take official notice of any disputed facts underpinning the CPUC decision that more interstate capacity is needed in California; rather, the CPUC merely requests that the Commission take official notice that the "CPUC persists in the view that new interstate pipeline capacity to California is needed and that the CPUC continues to support the Commission's immediate certification of the applicant's [PGT's] interstate pipeline expansion proposal herein, consistent with the requirements of federal law." We will grant the CPUC's motion on this basis. Altamont is free to pursue its concerns with the CPUC's decisional process in the appropriate forum.

VI. General Conclusion

All parties having had an opportunity to present facts and advance arguments on the issues raised by the applications in these proceedings, and after examination of the record developed in these proceedings with respect to all nonenvironmental issues, the Commission concludes that substantial evidence exists in the record to make a fair and reasoned decision on the merits. Upon consideration of the record, the Commission makes a preliminary finding that the proposal to operate and construct new expansion facilities, as modified herein, is required by the public convenience and necessity and satisfies the requirements for issuance of a section 7(c) certificate under the Commission's regulations.

As stated at the outset, the order issued here represents the Commission's decision regarding the above services and facilities on the basis of issues raised by the application which do not involve environmental matters. This preliminary order is subject to rehearing. A complete and final decision on PGT's applications cannot be made until the environmental review has been completed and its results are available for the Commission's consideration. We conclude only that, but for favorable

environmental review, certificates could be granted to PGT, subject to the conditions specified here, without further delay. A final order upon completion of the environmental assessment will address all environmental aspects of the application. Certificates will then be issued if the Commission, in accordance with section 7(c) of the NGA and NEPA, determines that the proposed new facilities and services continue to be required by the public convenience and necessity. This phased approach to consideration of the application promotes administrative efficiency and ensures timely and effective consideration of certificate applications in furtherance of the Commission's regulatory obligations and competitive policy goals and objectives.

At a hearing held on January 16, 1991, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the applications and exhibits thereto, submitted in support of the authorizations sought herein, and in consideration thereof,

The Commission orders:

(A) A preliminary determination is made in Docket Nos. CP89-460-000 and CP89- 460-001 that issuance of a certificate of public convenience and necessity to PGT under the Commission's section 7(c) certificate procedures as described and conditioned herein, and as more fully described in the applications, would, on the basis on all nonenvironmental issues, be in the public convenience and necessity.

(B) Pursuant to its authority under section 3 of the NGA and Delegation Order No. 0204-112, and under Executive Order Nos. 10485 and 12038, NGA section 3 authorization and a Presidential Permit for the siting, construction, operation and maintenance of the proposed facilities at the United States-Canada border will be approved in a final order as requested in Docket No. CP90-1-000, pending a final order in these proceedings addressing environmental matters as part of a complete record in the case.

(C) The certificate authorizations referenced in Ordering Paragraphs (A) and (B) above contemplate issuance, after completion of pending review of all environmental matters raised by the application, of a final order by the Commission determining, in accordance with NEPA and section 7(c) of the NGA, whether the proposal is required by the public convenience and necessity.

(D) PGT shall be required to file revised pro forma tariff sheets, as discussed herein, within 30 days after issuance of this order.

(E) The revised tariff sheets required by Ordering Paragraph (D) above must reflect the rates set forth in this order.

(F) PGT must establish procedures for a new open season for the initial allocation of capacity on its system. Such procedures must comply with this order and must be included in the tariff. The procedures must not accord an undue preference to any PGT affiliate.

(G) The late motions to intervene are granted.

(H) The requests for an evidentiary hearing are denied.

(I) The remaining procedural motions are granted and denied as discussed in this order.

(J) Upon acceptance of a certificate in this proceeding, PGT shall charge the rates recommended above for service through the proposed expansion project facilities, and these rates should be subject to adjustment to reflect the rate design method approved in Docket No. RP90-109-000. The rates approved herein are initial rates under section 7 of the Natural Gas Act, and our approval does not constitute approval of any underlying rate methodology, principle or concept to be used in any general rate change filed pursuant to section 4 of the Natural Gas Act. These initial rates will remain in effect until such time as PGT files to change the rates in section 4 proceeding. At that time, any party or the Commission's staff may propose new rates based on different methodologies, principles or concepts.

(K) To the extent that PGT's actual cost of service exceeds the estimated cost of service on which these initial rates are based, PGT shall assume the risk for any undercollection.

(L) PGT's revised tariff and precedent agreements shall not require deliveries beyond Malin.

(M) PGT shall be required to bear the responsibility for any shortfall in cost recovery if the Canada NEB fails to grant export authority of sufficient duration and volumes to allow for the recovery of the costs of the facilities approved herein. In that event, the applicants are explicitly prohibited from shifting any of the costs associated with the facilities authorized herein onto any of their other customers, unless it is proved that the customers are using the facilities. This same provision shall apply to the import authority ultimately granted by DOE/FE to the shippers if that import authority proves to be of shorter duration or a lower volume than necessary for the recovery of costs associated with the facilities and services authorized herein.

(N) PGT shall also be required to bear the responsibility for any shortfall in cost recovery should Foothills or ANG be unable to fully construct facilities to provide full deliveries of PGT's expansion volumes. In that event, PGT is explicitly prohibited from shifting any of the increased costs resulting from the reduced Foothills or ANG's volumes onto any of its customers.

(O) Approval of that portion of PGT's application involving its proposal to receive additional gas from Northwest at Stanfield shall not be delivered to prejudge the application filed in Docket No. CP91-780-000. Whether or not the capacity constructed by PGT for transportation of the gas to be supplied by Northwest at Stanfield will be considered used and useful, and subject for inclusive in PGT's rate base, will be subject to our decision in that proceeding.

Appendix A

Pacific Gas Transmission Company
Docket No. CP89-460-000
Motions to Intervene

Alberta Petroleum Marketing Commission
Alenco Resources Inc.
Altamont Gas Transportation Project[1,2]
American Natural Gas Corporation[1]
Amoco Canada Petroleum Company Ltd.
APEX[2,3]
Arco Oil and Gas Company
Bonus Energy, Inc.[1]
BP Gas Marketing Company[1,2]
Cabot Energy Marketing Corporation
California Industrial Group
Canadian Hunter Exploration Ltd.
Canadian Indicated Producers
Canadian Petroleum Association
Cascade Natural Gas Corporation
Chevron U.S.A. Inc.
City of Long Beach
Cogenerators of Southern California[1]
Colorado Interstate Gas Company
Conoco Inc.
Conwest Exploration Company Limited
CP National Corporation
El Paso Natural Gas Company[2]
Encor Energy Corporation Inc.
Foothills Pipe Lines (Yukon) Ltd.
Hadson Gas Systems, Inc.
Husky Oil Operations Ltd.

---

[1] Protest

[2] Request Hearing

[3] Alternative Pipeline Expansion Project.

IGI Resources, Inc.
Independent Petroleum Association of Canada
Inland Empire Paper Company
J. R. Simplot Co.
Kern River Gas Transmission Company[1,2]
Meridian Oil Inc.
MexUS Interstate Pipeline, Inc.[3]
Mobil Natural Gas Inc.
Mock Resources, Inc.
Mojave Pipeline Company
New Mexico Energy, Minerals and Natural Resources Department and the Commissioner of Public Lands for the State of New Mexico
North Canadian Oils Limited
Northwest Alaskan Pipeline Company
Northwest Industrial Gas Users[1]
Northwest Natural Gas Company[4]
Northwest Pipeline Corporation[1,2]
Pacific Gas and Electric Company
Pacific Interstate Transmission Company[1]
Paiute Pipeline Company and Southwest Gas Corporation
Pan-Alberta Gas Ltd.
Poco Petroluems Ltd.
ProGas Limited
Producer Associations[2]
Public Utility Commission of Oregon
Public Utilities Commission of the State of California[5]
San Diego Gas & Electric Company
S. H. Cowell Foundation
Shell Canada Limited
Simpson Paper Company
Southern California Edison Company
Southern California Gas Company[1,2]
Southern California Utility Power Pool and Imperial Irrigation District

---

[4] In support of project.

[5] Motion to Hold in Abeyance.

Southern Union Gas Company
Suncor, Inc.[1,2]
Sun Operating Limited Partnership
Texaco Inc. and Texaco Producing Inc.
Transwestern Pipeline Company
Union Pacific Resources Company
Union Texas Petroleum Corporation
United States Borax & Chemical Corporation[1]
Washington Natural Gas Company
Washington Utilities and Transportation Commission
Washington Water Power Company
Westcoast Energy Inc.
Western Gas Marketing Limited[2]
Windward Energy & Marketing Company[1]
Wyoming-California Pipeline Company[3]

Late Filed
Alberta Natural Gas Company Ltd.
Bonneville Fuels Corporation
California Energy Commission
Container Corporation of America
Great Falls Gas Company
Natgas U.S. Inc.
Northern Border Pipeline Company
Pacific Northwest Waterways Association[4]
Septre Resources Ltd.
Williams Gas Marketing Company
Wyoming Natural Gas Pipeline Authority

Appendix B

Amendment to Application
Docket No. CP89-460-001
Motions to Intervene

Amoco Canada Petroleum Company Ltd.
Amoco Production Company
City of Glendale California
IGI Resources, Inc.
Kern River Gas Transmission Company
Northwest Pipeline Corporation
Overthrust Pipeline Company
Pacific Interstate Transmission Company
Public Utility Commission of Oregon
Questar Pipeline Company
Suncor, Inc.
Southern California Gas Company
Transwestern Pipeline Company
Wyoming-California Pipeline Company

Late Filed
Alberta Natural Gas Company Ltd.
Altamont Gas Transportation Project
Associated Oregon Industries
BP Resources Limited
Encor Inc.
Natgas U.S. Inc.
Northern Border Pipeline Company
Petro-Canada Inc. and Petro-Canada Hydrocarbons Inc.
Public Utility Commission of the State of California
Williams Gas Marketing Company

Protest and/or Request Hearing
Kern River Gas Transmission Company
Petro-Canada Inc. and Petro-Canada Hydrocarbons Inc.
Southern California Gas Company

Appendix C

Offer of Settlement filed November 6, 1989
Docket No. CP89-460 et al.
Comments Filed on Offer of Settlement:

Amoco Canada Petroleum Company Ltd.[6]
Amoco Production Company[7]
Altamont Gas Transportation Project[8]
Bonneville Fuels Corporation[9]
Bonus Energy, Inc.[10]
BP Resources Canada Limited
California Industrial Group[6]
Canadian Indicated Producers[11]
Cascade Natural Gas Corporation
City of Burbank
City of Glendale California
City of Long Beach
El Paso Natural Gas Company[12]

---

[6] In opposition to settlement.

[7] Amoco supports the Altamont Project, requests hearing in this proceeding, and raises numerous issues including the allocation of costs associated with existing river crossings which PGT is not proposing to do even though the Expansion shippers will be using these existing facilities.

[8] Altamont states that the offer of settlement does not resolve existing material issues of law and fact with respect to PGT's application and amended application.

[9] Bonneville initially opposed the settlement but filed in July 1990 to withdraw its opposition.

[10] Bonus initially incorporated its protest filed before the CPUC; but on July 27, 1990, Bonus filed to withdraw its objections to the PGT Settlement.

[11] CIPS members oppose utilization of rolled-in pricing methodology.

[12] El Paso believes that PGT unfairly seeks, under the guise of a section 7(c) certificate, the administrative advantages of an optional certificate filing without the commensurate assumption of risk. El Paso opposes the Settlement and calls for a competitive hearing.

Encor Inc[13]
Kern River Gas Transmission Company[6,2]
IGI Resources, Inc.[14]
Inland Empire Paper Company[14]
Intermountain Gas Company[14]
Mojave Pipeline Company[6]
Natgas U.S. Inc.[14]
New Mexico Energy, Minerals and Natural Resources Department and Commissioner of Public Lands for the State of New Mexico[15]
North Canadian Oils Limited[14]
Northwest Industrial Gas Users
Northwest Natural Gas Company[14]
the Public Utility Commission of Oregon[14]
Petro-Canada Inc. and Petro-Canada Hydrocarbons Inc.[6]
Poco Petroleum Ltd.[16]
Producer Associations[6]
Public Utilities Commission of the State of California[17]
San Diego Gas & Electric Company[14]
Southern California Gas Company and Pacific Interstate Transmission Company[6]
Southern California Edison Company[14]
Spot Market Corporation
Washington Water Power Company[14]

---

[13] Encor submits that the compromise achieved by the offer of settlement, is prudent.

[14] In support of Settlement.

[15] New Mexico argues that the Commission must reject the November 8 Settlement offer; the FERC must examine PGT's expansion proposal in light of a complete record to satisfy its mandate to provide for the PC&N. The settlement does not result from an agreement reached, nor even negotiated, by all parties in this proceeding.

[16] Poco states that in reality the offer of settlement reflects solely an agreement between PGT and the firm expansion shippers who have filed Precedent Agreements with PGT.

[17] Motion to Hold in Abeyance.

Appendix D

Pacific Gas Transmission Company
Presidential Permit

The following parties filed motions to intervene in Docket No. CP90-1-000:

El Paso Natural Gas Company[18]
Foothills Pipe Lines Ltd.
Kern River Gas Transmission Company[19]
Mobil Natural Gas Inc.
Mojave Pipeline Company
Northridge Petroleum Marketing, Inc.
Northwest Pipeline Corporation
Pacific Interstate Transmission Company
Pan-Alberta Gas Ltd.
ProGas Limited
Southern California Gas Company
Westcoast Energy Inc.
Wyoming-California Pipeline Company

[18] El Paso filed a motion to consolidate Docket Nos. CP90-1-000, CP89-460-000 and CP89-460-001.

[19] Kern River also filed a protest. It states that the Commission should reject PGT's last minute addition of its affiliate, PGT, to the expansion project. Such an attempt, it states, is a transparent effort to shift some of the risks and costs of the project to captive downstream customers in California, so that PGT can decrease the unit cost of transportation for PGT's targeted markets in Southern California.

Appendix E

Pacific Gas Transmission Company
Comments on Technical Conference

Altamont Gas Transmission Company
Amoco Production Company and Amoco Canada Petroleum Company Ltd.
Bonus Gas Processors[20]
BP Gas, Inc.
BP Canada Resources Limited
Bonneville Fuels Corporation[21]
Burbank, Glendale and Pasadena
El Paso Natural Gas Company
Kern River Gas Transmission Company
Natgas U.S. Inc.
The State of New Mexico Department of Energy, Minerals and Natural Resources and the New Mexico State Land Office
Northwest Natural Gas Company
Pacific Gas and Electric Company
San Diego Gas & Electric Company[22]
Southern California Edison Company
Southern California Gas Company and Pacific Interstate Transmission Company
Suncor, Inc.

---

[20] Bonus withdraws its objections to PGT's settlement.

[21] Bonneville Fuels files for leave to file its statement of position one business day out of time. Bonneville Fules files to withdraw its initial comments in opposition to the offer of settlement filed by PGT.

[22] Filed out of time.

Appendix F

Permit Authorizing Pacific Gas Transmission Company to Construct, Operate, Maintain and Connect Natural Gas Facilities at the International Boundary Between the United States and Canada.

(Federal Energy Regulatory Commission Docket No. CP90-1-000)

Pacific Gas Transmission Company (Permittee), a corporation organized and existing under the laws of the State of California, filed in Docket No. CP90-1-000 on October 3, 1989, an application pursuant to Executive Order Nos. 10485 and 12038 and the Secretary of Energy's Delegation Order No. 0204-112, for a permit authorizing Permittee to construct, operate, maintain and connect the natural gas transmission facilities described in article 2 below on the international boundary between the United States and Canada.

By letter dated December 21, 1989, the Secretary of State, and by letter dated February 5, 1990, the Secretary of Defense favorably recommended that the Permit be granted. The Federal Energy Regulatory Commission finds that the issuance of a permit is appropriate and consistent with the public interest.

Pursuant to the provisions of Executive Order Nos. 10485 and 12038, dated September 3, 1953, and February 3, 1978, respectively, the Secretary of Energy's Delegation Order No. 0204-112, effective February 22, 1984, and the Commission's regulations, permission is granted to Permittee to construct, operate, maintain and connect the natural gas transmission facilities described in article 2 below, upon the terms and conditions of the permit.

Article 1. It is expressly agreed by the Permittee that the facilities herein described shall be subject to all provisions and requirements of this permit. This permit may be modified or

revoked by the President of the United States or the Federal Energy Regulatory Commission and may be amended by the Federal Energy Regulatory Commission upon proper application therefor.

Article 2. The following facilities are subject to this Permit:

A 42-inch natural gas pipeline connecting Pacific Gas Transmission Company's existing compression facility in Idaho two and one half miles from the United States-Canada international boundary with the system of Alberta Natural Gas Company Ltd./Foothills Pipeline (South B.c.) Ltd. at the international boundary near Kingsgate, British Columbia.

Article 3. The natural gas facilities authorized herein, or which may subsequently be included herein by modification or amendment, may be utilized for the transportation of natural gas from Canada to the United States only in the amount, at the rate, and in the manner authorized under section 3 of the Natural Gas Act.

Article 4. The construction, operation, maintenance, and connection of the aforesaid facilities shall be subject to the inspection and approval of representatives of the United States. The Permittee shall allow officers and employees of the United States, showing proper credentials, free and unrestricted access to the land occupied by the facilities in the performance of their official duties.

Article 5. If in the future it should appear to the Secretary of the Army that any facilities or operations permitted hereunder cause unreasonable obstruction to the free navigation of any of the navigable waters of the United States, the Permittee may be required, upon notice from the Secretary of the Army, to remove or alter the same so as to render navigation through such waters free and unobstructed.

Article 6. The Permittee shall be liable for all damages occasioned to the property of others by the operation or maintenance of the facilities, and in no event shall the United States

be liable therefor. The Permittee shall do everything reasonable within its power to prevent or suppress fires on or near land occupied under this Permit.

Article 7. The Permittee agrees to file with the Commission, under oath and in such detail as the Commission may require, such statements or reports with respect to the natural gas imported or the facilities described herein, as the Commission may, from time to time, request. Such information may be made available to any federal, state, or local agency requesting such information.

Article 8. Neither this permit nor the facilities, nor any part thereof, covered by this permit shall be voluntarily transferred in any manner, but the permit shall continue in effect temporarily for a reasonable time in the event of the involuntary transfer of the facilities by operation of law (including transfer to receivers, trustees, or purchasers under foreclosure or judicial sale) pending the making of an application for a permanent permit and decision thereon, provided notice is promptly given in writing to the Commission accompanied by a statement that the facilities authorized by this permit remain substantially the same as before the involuntary transfer. The Permittee shall maintain the facilities in a condition of repair for the efficient transportation of natural gas and shall make all necessary renewals and replacements.

Article 9. Upon the termination, revocation, or surrender of this permit, the transportation facilities herein authorized shall be removed within such time as the Commission may specify, and at the expense of the Permittee. Upon failure of the Permittee to remove such transportation facilities or any portion thereof, the Commission may direct that possession of the same be taken and the facilities be removed, at the expense of the Permittee, and the Permittee shall have no claim for damages by reason of such possession or removal.

Article 10. The Permittee agrees that when, in the opinion of the President of the United States, evidenced by a written order addressed to it as holder of this permit, the safety of the

United States demands it, the United States shall have the right to enter upon and take possession of any of the facilities, or parts thereof, maintained or operated under this permit, and all contracts covering the transportation or sale of natural gas by means of said facilities, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the Permittee; and in the event that the United States shall exercise such right it shall pay the Permittee just and fair compensation for the use of said facilities upon the basis of a reasonable profit in time of peace, and the cost of restoring said facilities to as good condition as existed at the time of taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the Permittee.

Article 11. This permit is subject to any action which the Government of the United States may in the future deem expedient or necessary to take in case any part of the aforesaid facilities comes into the control of any foreign government.

Article 12. The Government of the United States shall be entitled to the same or similar privileges as may by law, regulation, agreement, or otherwise, be granted by the Permittee to any foreign government.

Federal Energy Regulatory Commission

Appendix 3

Orders on Rehearing

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 91-1369 SEPTEMBER TERM, 1996

ALTAMONT GAS TRANSMISSION COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

GREAT LAKES GAS TRANSMISSION LIMITED PARTNERSHIP,
Intervenor

CONSOLIDATED WITH 93-1241, 93-1295, 93-1308,
93-1309, 93-1317

BEFORE: GINSBURG, ROGERS AND TATEL, CIRCUIT JUDGES

ORDER

UPON CONSIDERATION OF THE PETITION FOR REHEARING OF THE INDICATED EXPANSION SHIPPERS FILED OCTOBER 7, 1996, IT IS

ORDERED THAT THE PETITION BE DENIED.

PER CURIAM

FOR THE COURT:
MARK J. LANGER, *Clerk*

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1369 September Term, 1996

ALTAMONT GAS TRANSMISSION COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

GREAT LAKES GAS TRANSMISSION LIMITED PARTNERSHIP,
Intervenor

CONSOLIDATED WITH 93-1241, 93-1295, 93-1308, 93-1309, 93-1317

BEFORE: EDWARDS, CHIEF JUDGE; WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS AND TATEL, CIRCUIT JUDGES

ORDER

UPON CONSIDERATION OF THE SUGGESTION FOR REHEARING *In Banc* OF THE INDICATED EXPANSION SHIPPERS, AND THE ABSENCE OF A REQUEST BY ANY MEMBER OF THE COURT FOR A VOTE, IT IS

ORDERED THAT THE SUGGESTION BE DENIED.

PER CURIAM

FOR THE COURT:
Mark J. Langer, *Clerk*

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

CIRCUIT JUDGES HENDERSEN AND RANDOLPH DID NOT PARTICIPATE IN THIS ORDER.

Supreme Court, U.S.
FILED
FEB 28 1997
CLERK

No. 96-1179

In the
Supreme Court of the United States
October Term, 1996

Indicated Expansion Shippers,
Petitioner.

v.

Federal Energy Regulatory Commission,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT PACIFIC GAS TRANSMISSION COMPANY IN OPPOSITION

FRANK R. LINDH
General Counsel
Pacific Gas Transmission Company
2100 Southwest River Parkway
Portland, Oregon 97201-8009
(503) 833-4130

ELIAS G. FARRAH
MICHAEL F. McBRIDE*
BRUCE W. NEELY
JOSEPH H. FAGAN
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Avenue, N.W.,
Suite 1200
Washington, D.C. 20009
(202) 986-8000
*Counsel of Record
Attorneys for Respondent Pacific Gas Transmission Company

QUESTION PRESENTED

Where Congress has declared in § 1(c) of the Natural Gas Act that the rates charged by natural gas pipelines operated wholly within the State of consumption can be regulated by that State, was the Court of Appeals correct in concluding that those rates are beyond the purview of the Federal Energy Regulatory Commission's jurisdiction?

Rule 29.6 Listing

Respondent, Pacific Gas Transmission Company ("PGT"), is a wholly owned subsidiary of PG&E Gas Holdings, which is a wholly owned subsidiary of PG&E Corporation (a publicly traded corporation), and is a corporation organized and existing under the laws of the State of California. PGT's subsidiaries are all wholly-owned. Out of an abundance of caution, however, although not required by Rule 29.6, PGT hereby informs the Court that PG&E Corporation has entered into a merger agreement with Valero Energy Corporation, a publicly traded company. The merger has not been completed as of yet.

TABLE OF CONTENTS

QUESTION PRESENTED..... i

RULE 29.6 LISTING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

OPINIONS BELOW..... 1

JURISDICTION..... 1

STATEMENT OF THE CASE..... 2

ARGUMENT..... 3

CONCLUSION..... 4

TABLE OF AUTHORITIES

United Distribution Companies, v. FERC, 88 F.3d 1105 (D.C. Cir. 1996), *petitions for cert. filed*, 65 U.S.L.W. 3575-76 (U.S. Feb. 18, 1997) (Nos. 96-1186, 96-1187, 96-1188, 96-1189)..... 3

28 U.S.C. § 1254(1)..... 2

15 U.S.C. § 717(c)..... 3

In the
Supreme Court of the United States
October Term, 1996

No. 96-1179

Indicated Expansion Shippers,
Petitioner,

v.

Federal Energy Regulatory Commission,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT PACIFIC GAS TRANSMISSION COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion below of the Court of Appeals (Pet. App. 1- 17) is reported at 92 F.3d 1239. The orders of the Federal Energy Regulatory Commission ("FERC") (Pet. App. 19 - 303) are reported as described in the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 23, 1996. A timely petition for rehearing was denied on October 24, 1996. The Petition was filed on January 22,

1997, and docketed on January 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

At bottom, the only issue presented for review is whether the rate structure set by the California Public Utilities Commission ("CPUC") for natural gas transportation solely within California and subject to the CPUC's exclusive jurisdiction was beyond the FERC's jurisdictional purview under the Natural Gas Act. The Court of Appeals correctly stated the facts and the course of the proceedings below relating to this issue, and Respondent hereby incorporates that discussion herein by reference.

ARGUMENT

1. The decision below by the Court of Appeals was entirely correct and sufficiently disposes of the arguments raised in the Petition.

2. The Petition presents no issues of general importance which merit review. There is also no conflict among the Circuits. The proceeding below affected only a few parties, and arose in a factual setting that is not likely to recur.

3. Petitioner's basic disagreement with the Court of Appeals is a factual one. It claims that a rate policy adopted by the CPUC (the so-called "crossover ban") denied access to existing transportation facilities. In fact, counsel for the FERC correctly represented to the Court of Appeals at oral argument that the issue is a rate issue, not an access issue. *See* Transcript

attached hereto as Appendix A. Thus, the Court of Appeals was correct in concluding (Pet. App. 13):

> Both PG&E's postage stamp rate and its crossover ban are, in effect, rate policies approved or required by the CPUC. The crossover ban is a bookkeeping, not an operating, convention; regardless how the gas flows through the existing and the expansion facilities, a new user is billed at the rate applicable to the new facilities while an existing user is billed at the rate applicable to existing facilities.

4. The second question presented by the Petition, namely, whether the Court of Appeals' interpretation of a provision of a federal statute (15 U.S.C. § 717(c)) violates the Supremacy Clause, is incomprehensible. If Petitioner is contending that enforcement of a federal statute delegating a matter to the States is violative of the Supremacy Clause, that contention is nonsensical.

5. Most significantly, the Petition (Pet. 7) is premised on the argument that the decision below is in conflict with another decision of the Court of Appeals, *United Distribution Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *petitions for cert. filed*, 65 U.S.L.W. 3575-76 (U.S. Feb. 18, 1997) (Nos. 96-1186, 96-1187, 96-1188, 96-1189). There is no intra-Circuit conflict, and Petitioner's assertion to the contrary is misleading at best. Petitioner failed to advise the Court that the decision in *United Distribution Companies* was amended in relevant part, and any claimed intra-Circuit conflict has thereby

been eliminated. The Order amending the Court of Appeals' opinion in *United Distribution Companies* is attached hereto as Appendix B.

CONCLUSION

The Petition should be denied.

Respectfully submitted.

FRANK R. LINDH
General Counsel
Pacific Gas Transmission Company
2100 Southwest River Parkway
Portland, Oregon 97201-8009
(503) 833-4130

ELIAS G. FARRAH
MICHAEL F. McBRIDE*
BRUCE W. NEELY
JOSEPH H. FAGAN
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Avenue, N.W., Suite 1200
Washington, D.C. 20009
(202) 986-8000
*Counsel of Record

Attorneys for Respondent Pacific Gas Transmission Company

Dated: February 28, 1997

APPENDICES

Appendix A

Excerpt from Transcript of

Oral Argument in *Altamont Gas Transmission v. FERC*,

92 F.3d 1239 (D.C. Cir. 1996) (argued Nov. 14, 1995).

Tr. 56:

THE COURT: One last one, at least for me. Is it common ground that this is purely a rate case? There's no question of physical access?

MR. ABENDROTH: Yes. All of California is open in that sense.

THE COURT: Thank you.

Appendix B

Order Amending

United Distribution Companies v.

***FERC,* 88 F.3d 1105 (D.C. Cir. 1996),**

dated Oct. 29, 1996.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1485 **September Term, 1995**

United Distribution Companies,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

---

and consolidated cases

Before: WALD, SENTELLE and ROGERS, *Circuit Judges.*

ORDER

It is **ORDERED**, by the Court, on its own motion, that the opinion filed herein on July 16, 1996, is amended, as follows:

At page 72:

Delete footnote 62

and substitute therefor new footnote 62, as follows:

The LDCs briefly argue that NGA § 1(c), the so-called "Hinshaw exemption," deprives the Commission of jurisdiction over their capacity sales to their own end-users. In this regard, they refer us to Congress' determination in §1(c) that certain pipelines are "matters primarily of local concern and subject to regulation by the several States." 15 U.S.C. §717(c). For the reasons set out in the text, however, the Commission's authority to regulate capacity release arises from its jurisdiction over the interstate pipeline that consummates the transaction and the subject of the transaction, the interstate transportation of gas, entirely independent of its jurisdiction over the releasing or replacement shipper. Accordingly, we reject the LDC's claim, given that they do not suggest that FERC has improperly exercised jurisdiction over the release of capacity held on nonjurisdictional Hinshaw pipelines.

Per Curiam
FOR THE COURT
Mark J. Langer, Clerk

BY: /s/ Lisa Nanches
Lisa Nanches
Deputy Clerk

No. 96-1179

Supreme Court, U.S.
FILED
MAR 28 1997
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

October Term, 1996

INDICATED EXPANSION SHIPPERS,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT CALIFORNIA PUBLIC UTILITIES COMMISSION IN OPPOSITION

PETER ARTH, JR.
EDWARD W. O'NEILL
MARK FOGELMAN*

Public Utilities Commission
of the State of California
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-1992
*Counsel of Record

Attorneys for Respondent California Public Utilities Commission

March 28, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals for the District of Columbia Circuit correctly concluded that the Federal Energy Regulatory Commission's ("FERC's") rendition of findings, conclusions and certificate conditions for the conceded sole purpose of coercing changes in the rates of a state-regulated Hinshaw pipeline was beyond its statutory authority. *See* 15 U.S.C. §717(c).

2. Whether the Indicated Expansion Shippers, the sole petitioners herein, having unsuccessfully argued before the California Public Utilities Commission ("CPUC") and the California Supreme Court that the FERC's findings and conclusions below were correct and required the alteration of the CPUC's rate orders and then having allowed those CPUC and California Supreme Court decisions to become final by not filing a petition for a writ of certiorari in this Court, are barred by the doctrines of collateral estoppel and res judicata from raising those claims before this Court on a new petition for a writ of certiorari.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

The PGT Expansion and the PG&E Expansion 1

The CPUC's Incremental Rate Policy 2

The FERC's Attempts to Coerce Changes in the CPUC's PG&E Expansion Rate Structure 3

Private Parties' Attempts to Use the FERC's Findings and Conclusions to Coerce Changes in the CPUC's Rate Structure 11

Proceedings in the Court of Appeals 13

ARGUMENT 15

I. None of the Considerations Warranting a Grant of Certiorari is Present in this Case 15

II. Should the Solicitor General Take a Position Other Than That Certiorari Should Be Denied, the CPUC Reserves the Right to Respond in a Supplemental Brief 17

III. The Petition for Certiorari Is Barred in Any Event by the Doctrines of Res Judicata and Collateral Estoppel 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry, 449 U.S. 90 (1980) 19

Consumers Lobby Against Monopolies v. Pub. Util. Comm'n, 25 Cal.3d 891 (1979) 18

Detroit & Mackinac Ry. Co. v. Michigan Railroad Comm'n, 235 U.S. 402 (1914) 19

Federated Department Stores v. Moitie, 452 U.S. 394 (1981) 19

General Motors Corp. v. Tracy, 65 U.S.L.W. 4086 (Feb. 18, 1997) 15

Haring v. Prosise, 462 U.S. 306 (1983) 19

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 19

Migra v. Warren City School District, 465 U.S. 75 (1984) 19

Mobil Oil Corp. v. FERC, 886 F.2d 1023 (8th Cir. 1989) 11

Napa Valley Electric Co. v. Railroad Comm'n of California, 251 U.S. 366 (1920) 18

Norcen Energy Resources, Ltd. v. Pacific Gas and Electric Co., No. C-94-0911-VRW (N.D. Cal.) 13

Pacific Tel. & Tel. Co. v. Pub. Util. Comm'n of California, 600 F.2d 1309 (9th Cir. 1983), cert. denied, 444 U.S. 920 (1979) 18

Panhandle Eastern Pipe Line Corp. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329 (1951) 15

People v. Western Air Lines, 42 Cal.2d 621, appeal dismissed, 348 U.S. 859 (1954) 18

TABLE OF AUTHORITIES – Continued

Page

Southern Pacific Transp. Co. v. Pub. Util. Comm'n of California, 716 F.2d 1285 (9th Cir. 1983), cert. denied, 466 U.S. 936 (1984) 18

Sunray Oil Co. v. FPC, 364 U.S. 137 (1960) 15

United Distribution Companies v. FERC, 88 F.3d 1105 (D.C. Cir. 1996), petitions for cert. docketed, Nos. 96-1186, 96-1187, 96-1188, 96-1189, 65 U.S.L.W. 3575-76 (Feb. 18, 1997) 16

FERC Decisions

Altamont Gas Transmission Co., 53 FERC ¶ 61,395 (1991) 5

Pacific Gas Transmission Co., 54 FERC ¶ 61,035 (1991) 3

Pacific Gas Transmission Co., 56 FERC ¶ 61,192 (1991) 1, 5

Pacific Gas Transmission Co., 57 FERC ¶ 61,097 (1991) 9

Pacific Gas Transmission Co., 62 FERC ¶ 61,243 (1993) 10

Pacific Gas Transmission Co., 64 FERC ¶ 61,052 (1993) 11

Pacific Gas Transmission Co., 68 FERC ¶ 61,197 (1994) 13

Suncor, Inc. v. Pacific Gas Transmission Co., 67 FERC ¶ 61,352 (1994) 12

TABLE OF AUTHORITIES – Continued

Page

CPUC DECISIONS

D.90-02-016, Re Interstate Natural Gas Pipeline Supply and Capacity, 35 Cal.P.U.C.2d 196, 110 P.U.R.4th 486 (1990) 2

D.90-12-119, Re Pacific Gas and Electric Co., 39 Cal.P.U.C.2d 69 (1990) 1, 3

D.91-06-017, Re Pacific Gas and Electric Co., 40 Cal.P.U.C.2d 497 (1991) 4, 8

D.91-06-053, Re Pacific Gas and Electric Co., 40 Cal.P.U.C.2d 628 (1991) 4, 8

D.92-10-056, Re Pacific Gas and Electric Co., 46 Cal.P.U.C.2d 199 (1992) 2, 9, 11

D.93-02-018, Re Pacific Gas and Electric Co., 48 Cal.P.U.C.2d 162 (1993) 11

STATUTES

15 U.S.C. §717(c) 5, 15

28 U.S.C. §1738 19

Cal. Pub. Util. Code §1709 18

COURT RULES

U.S. Sup. Ct. R. 12.6 17

U.S. Sup. Ct. R. 13 17

U.S. Sup. Ct. R. 15.8 18

STATEMENT OF THE CASE

The PGT Expansion and the PG&E Expansion

The Pacific Gas Transmission Company/Pacific Gas and Electric Company ("PGT/PG&E") Expansion Project consisted of two separate proposals – a proposal to the FERC to expand PGT's interstate natural gas transmission facilities from Canada to the California/Oregon Border at Malin and a separate but related proposal to the CPUC to expand PG&E's intrastate California gas transmission facilities from Malin to Kern River Station in Southern California. The PGT interstate certificate application was considered by the FERC in Docket No. CP89-460-000, and a certificate was issued to PGT in *Pacific Gas Transmission Company,* 56 FERC ¶ 61,192 (1991). The PG&E intrastate certificate application was considered by the CPUC in Application No. 89-04-033, and a certificate was issued to PG&E in CPUC decision ("D.") 90-12-119, *Re Pacific Gas and Electric Company,* 39 Cal.P.U.C.2d 69 (1990), LD, Ex. C.[1]

---

[1] Petitioners failed to provide in their appendix true copies of the relevant CPUC decisions which were considered by the FERC and the D.C. Circuit in this case. For the Court's convenience, the CPUC will lodge with the Clerk the following documents, all of which are on file in the D.C. Circuit: (1) CPUC Mot. for Judicial Notice (Aug. 8, 1995); (2) Declaration of Counsel [Mark Fogelman] (Aug. 8, 1995), containing all relevant CPUC decisions as well as documents demonstrating that the instant petition raises claims that petitioners raised and lost on the merits in a final decision of the California Supreme Court; (3) CPUC Reply in Suppt. of Mot. for Judicial Notice (Sept. 1, 1995); and (4) Order Granting CPUC Mot. for Judicial Notice (Sept. 26, 1995). As herein used "LD" refers to the lodged documents and "LD, Ex. ___" refers to exhibits attached to the declaration of counsel which is one of the lodged documents.

The CPUC's Incremental Rate Policy

In 1990 the FERC granted optional certificates of public convenience and necessity to several applicants seeking to construct new competing interstate natural gas pipelines to serve California markets. These new pipeline projects were necessarily incrementally priced, *i.e.*, their rates were designed to recover the stand-alone cost of the new construction rather than "rolling-in" the cost of new facilities with the cost of existing facilities.

In February, 1990, the CPUC issued its Interstate Pipeline OII Decision, D.90-02-016, *Re Interstate Natural Gas Pipeline Supply and Capacity,* 35 Cal.P.U.C.2d 196, 110 P.U.R.4th 486 (1990), LD, Ex. A. In that decision, the CPUC found a need for additional interstate pipeline capacity to serve California markets and, attempting to harmonize its policies with those of the FERC, adopted a pro-competitive "let the market decide" policy for determining whether the CPUC should support or oppose the construction of new interstate pipeline proposals before the FERC. The decision established criteria which, if satisfied, would allow the CPUC to support new interstate pipeline applications before the FERC, and one such criterion was a requirement of incremental rates in order to ensure (1) that customers for whose benefit the costs of new construction were incurred would bear responsibility for those costs, (2) that there would not be overinvestment in new pipeline capacity and the consequent creation of stranded investment, and (3) that new capacity would be able to compete fairly with other new incrementally-priced capacity. *See* 35 Cal.P.U.C.2d at 213, 239, 240, 245, 247, LD, Ex. A; *see also* D.92-10-056, *Re Pacific Gas and Electric Company,* 46 Cal.P.U.C.2d 199, 204-209, 138 P.U.R.4th 105 (1992), LD, Ex. G.

On April 11, 1990, after PGT proposed that its initial rates for the PGT expansion would be based on an incremental cost allocation, the CPUC amended its intervention in the PGT expansion case before the FERC to indicate that PGT had satisfied the CPUC's criteria and that the CPUC supported the application.

The FERC's Attempts to Coerce Changes in the CPUC's PG&E Expansion Rate Structure

On December 27, 1990, the CPUC granted PG&E a certificate of public convenience and necessity to construct the PG&E intrastate expansion. *See* D.90-12-119, *Re Pacific Gas and Electric Company,* 39 Cal.P.U.C.2d 69 (1990), LD, Ex. C. The decision adopted a "pure incremental" method of cost allocation, concluding that "[c]osts of the Expansion Project will be recovered only from the Expansion's customers." *Id.* at 93. Attempting to protect the interests of captive customers who had no need for the PG&E expansion, the decision stated: "No costs of the Expansion will be allocated to PG&E's existing customers, except to the extent that PG&E itself is a customer of the Expansion Project." *Id.*

On January 22, 1991, the FERC issued its order in *Pacific Gas Transmission Company,* 54 FERC ¶ 61,035 (1991) ("January 22nd Order"), which required PGT to hold a new open season for the sale of expansion capacity. The decision found that there was language in PGT's tariff and precedent agreement relating to intrastate transportation on the PG&E system within California which "may be an illegal tying arrangement between interstate and intrastate transportation" and required PGT to exclude language concerning intrastate transportation from its tariff and agreement. 54 FERC at 61,156.

The FERC opined that rates for transportation on the intrastate PG&E expansion should be mileage-based rates rather than "postage stamp" rates – even though *all* rates established by the CPUC for intrastate transportation within California are postage stamp rates – stating that "there should be rates and additional delivery points available for shippers who desire some portion or all of their volumes to be delivered in Northern California before the gas reaches Kern River Station." *Id.*

On June 5, 1991, the CPUC issued D.91-06-017, *Re Pacific Gas and Electric Company,* 40 Cal.P.U.C.2d 497 (1991), LD, Ex. D. The decision changed the PG&E expansion's "pure incremental" cost allocation to an "allocated incremental" cost allocation, so that existing ratepayers would bear the cost of original facilities, incremental ratepayers would pay the cost of incremental facilities, and a portion of the cost of the original facilities would be allocated between existing and incremental ratepayers based on their relative usage of the expanded PG&E facilities. *Id.* at 502-503. The CPUC also clarified that its decisions do not "limit Expansion deliveries to a single delivery point" in California, *id.,* at 504-505, and rejected the notion that its incremental rate structure created an anticompetitive or unlawful tying arrangement. *Id.* The decision also established the so-called "crossover ban," requiring incremental PGT expansion shippers who transport incremental volumes of gas south from Malin on PG&E's system to pay the incremental PG&E expansion rate. *Id.* at 505-506.

On June 19, 1991, the CPUC issued D.91-06-053, *Re Pacific Gas and Electric Company,* 40 Cal.P.U.C.2d 628 (1991), LD, Ex. E. The decision reaffirmed the crossover ban, explaining that the purpose of this requirement was to preserve and to protect from erosion the CPUC's incremental cost allocation. *Id.*, at 632. The CPUC found that allowing

incremental PGT expansion shippers to use the existing facilities rate would result in "rolled-in pricing and a shift of risk to existing ratepayers." *Id.*

The CPUC also found that requiring incremental PGT shippers using the PG&E expansion to pay the postage stamp rate would not result in an unlawful tying arrangement because PG&E expansion shippers were free to deliver their gas anywhere in PG&E's service territory. *Id.* The CPUC also expressed its intention to modify its orders in a future proceeding so as to eliminate any double charge for intrastate mainline transportation. *Id.*, at 633, 634.

On August 1, 1991, in *Pacific Gas Transmission Co.*, 56 FERC ¶ 61,192 (1991) ("August 1st Order"), the FERC granted PGT a certificate of public convenience and necessity approving the FERC-jurisdictional leg of the PGT/PG&E Expansion Project. In the August 1st Order, the FERC repeatedly acknowledged that pursuant to the Hinshaw Amendment to the NGA, 15 U.S.C. §717(c), PG&E's rates, services and facilities are subject to the exclusive regulatory authority of the CPUC. It said: "Since the proposed PG&E facilities are intrastate facilities, the CPUC, rather than the Commission, has jurisdiction over those facilities." 56 FERC, at 61,684. It stated: "[W]e will not clarify or rule on the propriety of PG&E downstream services and rates, since PG&E is a Hinshaw pipeline and is regulated by the Public Utilities Commission of the State of California." *Id.*, at 61,699. And it further stated, quoting *Altamont Gas Transmission Co.*, 53 FERC ¶ 61,395 (1991), at 62,375: "PG&E is a 'non-jurisdictional local distribution company whose existing and planned expansion facilities are located entirely in the State of California, [and] is not required to file its related expansion application with the Commission.' " 56 FERC, at 61,712, fn. 76.

The FERC also found that the earlier-disapproved PGT tariff language relating to intrastate transportation south of Malin had been eliminated from PGT's tariff and precedent agreement, *id.*, at 61,721 and n. 115, and approved PGT's new open season as "fairly administered and comport[ing] with the purpose of an open season," *id.*, at 61,721.

Nevertheless, the FERC stated that it was "concerned about the existence of a tying relationship between transportation service north of Malin and transportation service south of Malin (including the postage [stamp] rate charged for such service)." *Id.* at p. 61,721. It reaffirmed its earlier determination of an unlawful tying arrangement, and found that the CPUC's crossover ban had exacerbated the tying arrangement "by requiring that expansion shippers on PGT must also use the PG&E expansion." *Id.*, at 61,725. It therefore concluded that "PGT may not initiate construction until the Commission is assured that the PGT shippers are receiving nondiscriminatory treatment as to access to the California markets by means other than on the PG&E expansion." *Id.*, at 61,726.

In particular, the FERC found fault with (1) the CPUC's allowance of duplicative backbone transmission charges which enabled PG&E to impose higher rates on Northern California shippers than on Southern California shippers, (2) the CPUC's postage stamp transportation rate, (3) the CPUC's selection of incremental rather than rolled-in pricing for the PG&E expansion, and (4) the CPUC's imposition of the so-called "crossover ban" – the feature of the CPUC's incremental rate design which is intended to ensure that the class of incremental customers for whose benefit the costs of the PG&E expansion were incurred bears responsibility for those costs. The crossover ban requires incremental PGT expansion shippers to pay the incremental expansion rate for intrastate transportation from Malin to points in California on the integrated PG&E system. While it does not deprive any shipper of

physical access to the PG&E system or of the ability to deliver its volumes at any point on the PG&E system, it does require the class of incremental customers for whose benefit the new facilities were constructed to pay the incremental cost of those facilities. 56 FERC, at 51,723-61,726.[2]

The FERC concluded that these features of the CPUC's intrastate rate orders were unduly discriminatory in that they constituted "an illegal tying arrangement," a "discriminatory [and] . . . anticompetitive . . . tying arrangement" and "discriminatory practices." *Id.* at 61,725-61,726. The FERC therefore imposed a condition on PGT's certificate requiring the CPUC to alter its intrastate rate structure to eliminate such discrimination before construction of the PGT expansion could begin. *Id.*, at 61,728. The FERC also stated that "without this condition, we could make no public convenience and necessity finding." *Id.*, at 61,726.

On August 20, 1991, the CPUC filed written comments responding to the construction condition and the FERC's underlying findings and conclusions. The CPUC stated in part:

> The CPUC respectfully submits that its interim rate determinations for PG&E's intrastate expansion facilities, including the "postage stamp" rate design and the "crossover" ban, are a legitimate exercise of the state's ratemaking authority. The CPUC also

---

[2] The expanded PG&E pipeline is fully integrated. Molecules of gas transported on that line move through a single set of facilities. The question resolved by the CPUC's rate orders, then, is simply whether the cost of the expansion will be borne by incremental customers – for whose benefit the facilities were expanded – through incremental rates, or in part by existing captive customers – who had no need for the expansion – through rolled-in rates. For reasons exhaustively stated in its decisions, the CPUC chose the former.

> respectfully submits that the Commission, in utilizing its certificate conditioning power under the Natural Gas Act to compel a change in rates which the Natural Gas Act explicitly removes from the Commission's jurisdiction, is in excess of its lawful authority. Finally, the CPUC respectfully submits that the Commission's authority to determine whether the present or future public convenience and necessity requires the construction of a pipeline does not allow it to withhold a determination of the public convenience and necessity on the sole ground that rate determinations within the exclusive jurisdiction of a state are not consistent with the Commission's wishes.

The CPUC also stated its intention to eliminate the duplicative backbone transmission charges allowed under its then existing PG&E expansion rate structure and its willingness to reconsider on rehearing the issues of postage stamp rates, incremental rates and the crossover ban. *Id.*, at 7.

Thereafter on September 3, 1991, the CPUC timely filed its request for rehearing of the August 1st Order. The request for rehearing made clear that the CPUC was separately challenging *both* the construction condition *and* "the factual and legal determinations upon which that condition rests." *Id.*, at 1.

On September 6, 1991, the CPUC, taking official notice of the FERC's August 1st Order, granted expedited rehearing of D.91-06-017 and D.91-06-053, LD, Ex. F. This rehearing was as promised in the CPUC's August 20, 1991, filing before the FERC, and in its request for rehearing before the FERC. The CPUC's rehearing order granted an evidentiary hearing

on four rate issues related to the PG&E Expansion: (1) incremental vs. rolled-in pricing, (2) the crossover ban, (3) elimination of duplicative transmission charges, and (4) the postage stamp rate design. *Id.*, at 4-5.

On October 24, 1991, the FERC issued its order on report, *Pacific Gas Transmission Company*, 57 FERC ¶ 61,097 (1991) ("October 24th Order"). The October 24th Order stated that it did "not intend to intrude upon the CPUC's jurisdiction over the California gas market," *id.*, at 61,360, but reaffirmed its findings and conclusions of an unlawful tying arrangement and undue discrimination based upon the CPUC's postage stamp rate design and crossover ban. *Id.*, at 61,360-61,361. It did, however, eliminate the construction condition and substitute in its place a penalty on PGT's rate of return on equity "until such time that PGT demonstrates that neither its rates or transportation policies *nor those of PG&E* result in unduly discriminatory restraints on shippers' access to transportation on PGT's expansion project and *transportation service within California.*" *Id.*, at 61,360-61,361 (emphasis added).

On October 21, 1992, following a full evidentiary hearing and the issuance of an Administrative Law Judge's proposed decision, the CPUC issued its order on rehearing, D.92-10-056, *Re Pacific Gas and Electric Company*, 46 Cal.P.U.C.2d 199 (1992), LD, Ex. G. The CPUC's order thoroughly addressed the history and substance of the issues between the CPUC and the FERC, *id.*, at 204-209, concluding (1) that the PG&E expansion would continue to have incremental rates, *id.*, at 204-206; (2) that the crossover ban would continue to be enforced "to ensure that existing customers are not forced to pay for incremental facilities which are not being constructed primarily for their benefit" and that the ban did not constitute an unlawful tying arrangement, *see id.*, at 207; (3) that the CPUC's postage stamp rate design for the

expansion would continue, *id.*, at 208; and (4) that duplicative backbone transmission charges applicable to PG&E expansion customers would be eliminated, *id.*, at 208-209.

On March 16, 1993, the FERC issued its rehearing order, *Pacific Gas Transmission Company*, 62 FERC ¶ 61,243 (1993) ("March 16th Order"). While the March 16th Order acknowledged the results of the CPUC's rehearing in D.92-10-056, *id.*, at 62,618, it nevertheless reaffirmed its findings and conclusions of an unlawful tying arrangement and undue discrimination. *Id.*, at 62,618-62,619. In ruling on the CPUC's and other requests for rehearing, the FERC adhered to the rate of return penalty imposed in the October 24th Order. It stated as follows: "We recognize that the unduly discriminatory rate conditions are the product of rate and transportation policies subject to the jurisdiction of the CPUC. . . . Accordingly, we decline to dictate the form a remedy might take." 62 FERC, at 62,618. It further stated: "[W]e are deliberately not engaging in an effort to dictate or exercise veto control over intrastate rates and transportation policies. We do note in passing that the elimination of the unduly discriminatory conditions need not require removing the crossover ban. For example, mileage-based intrastate rates may ameliorate the constraints on open access imposed by the CPUC's current transportation policy, or, if gas volumes on PG&E's existing and expansion facilities are transported under a rolled-in rate, then the crossover ban would appear to be irrelevant." *Id.*, at 62,618, text and fn. 81.[3]

---

[3] After correctly stating that "the crossover ban is no way connotes a limitation on a shipper's physical access to particular facilities," 62 FERC, at 52,618, the March 16th Order erroneously stated that under the CPUC's rate orders delivery of expansion volumes destined for northern California "would have to be scheduled via a semi-round trip, first south on PG&E's Expansion to its terminus at the Kern River Station, then back north on PG&E's existing facilities." *Id.* As the FERC was well aware, the CPUC

Private Parties' Attempts to Use the FERC's Findings and Conclusions to Coerce Changes in the CPUC's Rate Structure

On November 23, 1992, the Indicated Expansion Shippers, petitioners herein, sought rehearing of D.92-10-056, contending that the FERC's findings and conclusions of an unlawful tying arrangement and undue discrimination were correct and that the CPUC's rate structure had to be changed. LD, Ex. I. On February 3, 1993, the CPUC issued D.93-02-018, *Re Pacific Gas and Electric Company,* 48 Cal.P.U.C.2d 162 (1993), LD, Ex. H, denying rehearing of D.92-10-056. Then, on March 8, 1993, the Indicated Expansion Shippers petitioned for review of the CPUC's orders in the California Supreme Court, making the same arguments. LD, Ex. J and K. The petition for review was denied by the California Supreme Court on May 13, 1993, in California Supreme Court Case No. S031579. LD, Ex, L. The Indicated Expansion Shippers did not seek further review by filing a petition for certiorari in this Court.

Similar challenges to the crossover ban based on the FERC's findings and conclusions herein were made in PGT's Order No. 636 Restructuring Docket, Docket No. RP92-46-000. On July 12, 1993, in that docket, the FERC issued its PGT order on compliance with restructuring rule and related offer of settlement, *Pacific Gas Transmission Co.,* 64 FERC ¶ 61,052 at 61,448, 61,486-61,487 (1993) ("July 12th Order). In that Order, the FERC expressly rejected those

---

had eliminated duplicative backbone transmission rates from its expansion rate structure. Moreover, the FERC itself has approved postage stamp rates on occasion. *See, e.g., Mobil Oil Corp. v. FERC,* 886 F.2d 1023, 1032 (8th Cir. 1989). The order also erroneously assumed that the CPUC had allocated rights to intrastate transportation capacity on the existing PG&E system. To date, the CPUC has not done so.

attacks but adhered to its earlier rulings. It said: "As previously discussed, the Commission has examined the issue of the 'crossover ban' in detail in several previous orders certificating PGT's Expansion Project and will not modify those conclusions here." *Id.*, at 61,487.

On March 18, 1993, three other expansion shippers filed a complaint with the FERC in *Suncor, Inc. v. Pacific Gas Transmission Company,* Docket No. CP93-260, based largely on the FERC's findings and conclusions herein. LD, Ex. M. The CPUC and other parties filed motions for summary disposition, and, on June 21, 1994, the FERC issued its decision in *Suncor, Inc. v. Pacific Gas Transmission Company,* 67 ¶ 61,352 (1994) ("Suncor Order"), dismissing the complaint. The FERC determined not "to revisit and modify our previous decision not to insist on removal of the crossover ban." *Id.*, at 62,226 (footnote omitted). The FERC stated that "the CPUC's action has mitigated, but not cured, the potential for its policies to cause PGT Expansion Project shippers to suffer undue discrimination in seeking access to PG&E's intrastate transportation services." *Id.* While letting its previous findings and conclusions stand, the FERC stated that it had "determined that enforcement of the crossover ban by itself need not result in discrimination that would unduly burden interstate commerce or violate the NGA," *id.*, at 62,227, and that "complainants have not shown that PGT's Expansion shippers will, in practice, suffer undue discrimination when seeking access to PG&E's facilities," *id.*, at 62,228. On July 20, 1994, the complainants filed a request for rehearing with the FERC, raising the same arguments predicated on the FERC's findings and conclusions herein. LD, Ex. N. The request for rehearing remains pending, and the FERC has indicated in a subsequent order that its rehearing order in *Suncor* will consider the validity of the crossover ban. *See*

Pacific Gas Transmission Co., 68 FERC ¶ 61,197, at p. 61,974 (1994).

On March 16, 1994, one of the Indicated Expansion Shippers filed an antitrust action against PG&E in the U.S. District Court for the Northern District of California in *Norcen Energy Resources, Ltd. v. Pacific Gas and Electric Company*, C-94-0911-VRW (N.D. Cal.), challenging the CPUC's postage stamp rates and the crossover ban and relying on the FERC's finding and conclusions herein. Complaint, at 27-29, Ld, Ex. O. On September 19, 1994, U.S. District Judge Vaughn R. Walker dismissed the complaint without prejudice, ruling that the crossover ban and postage stamp rates were immunized from the antitrust laws by the state action doctrine. Order Dismissing Complaint, at 17-19, LD, Ex. P. The Court also rejected the claim that the crossover ban constitutes an unlawful tying arrangement. *Id.*, at 34-35. On October 19, 1994, the plaintiffs filed an amended complaint. On July 27, 1995, the District Court dismissed the amended complaint, except for a few pendent state law claims.

Proceedings in the Court of Appeals

On August 8, 1995, the CPUC filed a substantial motion for judicial notice before the Court of Appeals, providing many pages of documentary evidence demonstrating the unsuccessful efforts of the Indicated Expansion Shippers and others to use the FERC's findings and conclusions below to coerce changes in the CPUC's PG&E expansion rate structure. The Indicated Expansion Shippers opposed the motion, and on September 1, 1995, the CPUC replied, making clear that one of the motion's primary purposes was to show that numerous parties to the proceedings, including the Indicated Expansion Shippers, had lost claims predicated on the FERC's findings and conclusions in collateral proceedings

which had become final. LD, CPUC Mot., at 2; CPUC Reply, at 3. The proffered documents included excerpts from the Indicated Expansion Shippers' application for rehearing, petition for review in the California Supreme Court and reply brief in the California Supreme Court, as well as the California Supreme Court's order denying review. LD, Ex. I, J, K, L. On September 26, 1995, the Court of Appeals granted the motion for judicial notice. LD, Order, D.C. Cir. Nos. 91-1369, *et al.* (Sept. 26, 1995).

In its respondent's brief in the Court of Appeals, the FERC admitted, as it had in its decisions, that its findings, conclusions and certificate conditions were intended "to *induce changes in PG&E's rates in accordance with the [FERC's] policies*." RB 19 (emphasis added).

The Court of Appeals thereafter determined that the FERC's findings, conclusions, and certificate conditions constituted an attempt "to do indirectly what the FERC cannot do directly" and improperly addressed matters that were "off-limits to the FERC." Pet. App. 16, 17. It granted PGT's petition for review and, "[b]ecause it granted [that] petition in sufficient part to give the CPUC *all the relief it seeks*," Pet. App. 10 (emphasis added), it dismissed the CPUC's petition as moot. Pet. App. 17. It also denied without comment "the petition filed by . . . the Expansion Shippers." Pet. App. 17.

The PG&E expansion's incremental rate structure, including the crossover ban and postage stamp rates, remains in effect.

ARGUMENT

I. None of the Considerations Warranting a Grant of Certiorari is Present in this Case

In a thoughtful and measured decision, the District of Columbia Circuit correctly determined that the CPUC may properly require and enforce incremental rates for an expansion of the facilities of a Hinshaw pipeline subject to its exclusive jurisdiction without significant gratuitous interference from the FERC, which is statutorily prohibited from regulating the rates, services and facilities of a Hinshaw pipeline. *See* 15 U.S.C. §717(c). The D.C. Circuit accordingly disapproved FERC findings, conclusions and certificate conditions, the sole purpose of which was, as conceded by the FERC, to " 'induc[e] a change [of state] policy beyond [its] jurisdictional purview.' " Pet. App. 13.

The decision of the D.C. Circuit is fully consistent with the relevant provisions of the Natural Gas Act and the decisions of this Court. *See, e.g.,* 15 U.S.C. §717(c); *General Motors Corp. v. Tracy,* 65 U.S.L.W. 4086, 4088 n. 3, 4093-94 (Feb. 18, 1997) (in rejecting Commerce Clause claim, the Court stressed "[t]he continuing importance of the States' interest in protecting the captive market from the effects of competition for the largest consumers"); *Sunray Oil Co. v. FPC,* 364 U.S. 137, 152 (1960) (the FERC may not use its certificate conditioning authority under the NGA to do indirectly that which it cannot do directly). Indeed, *Tracy* forcefully confirms the correctness of the D.C. Circuit's decision here. There the Court's discussion of "the importance of traditional regulated service to the captive market," 65 U.S.L.W. at 4093, makes it highly unlikely that FERC's intrusion on a State's incremental rate structure designed to protect captive customers would withstand scrutiny by this Court. *Tracy* breathed new life into cases such as *Panhandle*

Eastern Pipeline Co. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329 (1951), *id.,* at 4094, 4095, it reserved judgment on the correctness of Court of Appeals decisions concluding that States are without authority to forestall or mitigate the adverse impacts on captive customers of LDC bypass, *id.,* at 4094 n. 14, and its reaffirmed the continuing vitality of the Hinshaw Amendment, *id.,* at 4088 n. 3, 4090. In the face of such a recent ruling, there is simply no need for this Court to consume its precious resources to review a Court of Appeals decision which is manifestly correct.

In addition, the D.C. Circuit's decision is not inconsistent with any decision of any other Circuit or any State court of last resort, and petitioners make no such claim. Moreover, their assertion that an intracircuit conflict exists between the Court of Appeals decision here and *United Distribution Companies v. FERC,* 88 F.3d 1105 (D.C. Cir. 1996), *petitions for cert. docketed,* Nos. 96-1186, 96-1187, 96-1188, 96-1189, 65 U.S.L.W. 3575-76 (Feb. 18, 1997), is unfounded and was decisively put to rest by the D.C. Circuit's order amending the *United Distribution Companies* decision on rehearing. *See* PGT Br. in Opp., App. B. Beyond these considerations, the facts of this case are complex and unique and have nothing to do with the interstate pipeline capacity release issues involved in *UDC.* Whatever action the Court takes with respect to the pending *UDC* petitions, it should deny certiorari in this case. This case presents no important question of law which has not been, but should be, settled by this Court.

II. Should the Solicitor General Take a Position Other Than That Certiorari Should Be Denied, the CPUC Reserves the Right to Respond in a Supplemental Brief

In the Court of Appeal, the CPUC and PGT argued that the FERC had gone too far. The CPUC challenged the FERC's findings and conclusions as impermissibly intruding on State jurisdiction. PGT argued that the FERC's imposition of a rate penalty certificate condition based on those findings was beyond its authority and in any event not rationally related to coercing a change in the CPUC's rate policies.

At the other end of the spectrum, the Indicated Expansion Shippers and others seeking to obtain lower rates by placing a greater rate burden on captive California customers who neither needed nor sought the expansion of PGE's state-regulated system argued that the FERC had not gone far enough. Those parties contended that based on its findings, the FERC should have altered the CPUC's rate policies directly.

In the Court of Appeal, the CPUC and PGT prevailed and all other parties, including the FERC, lost. Hence, the CPUC and PGT are the only true respondents – defending the decision of the Court of Appeal – before this Court.

After losing this case in the D.C. Circuit, the FERC and the Solicitor General did not petition for a writ of certiorari within the 90-day period following the denial of rehearing required by Rule 13 of this Court. Nor did they file a response supporting a grant of certiorari within the 20-day period following the docketing of the instant petition as required by Rule 12.6 of this Court. However, when questioned by the CPUC as to their position in this Court, the FERC and the Solicitor General have refused to state whether their position is other than simply contending that certiorari should be denied. Accordingly, the CPUC objects to any claim of the

FERC and the Solicitor General advocating a grant of certiorari or other argument that would alter the D.C. Circuit's decision in this case and reserves the right to respond to any such argument in a supplemental brief pursuant to Rule 15.8 of this Court.[4]

III. The Petition for Certiorari Is Barred in Any Event by the Doctrines of Res Judicata and Collateral Estoppel

The Indicated Expansion Shippers' petition for certiorari is barred by the doctrines of res judicata and collateral estoppel. Cal. Pub. Util. Code §1709 provides: "In all collateral actions or proceedings the orders and decisions of the [CPUC] which have become final shall be conclusive."

State and federal courts, including this Court, have frequently employed the principles embodied in this statute to bar state and federal court challenges to orders of the CPUC which have survived review by the California Supreme Court. *See, e.g., People v. Western Air Lines,* 42 Cal.2d 621, 630, *appeal dismissed,* 348 U.S. 859, 860 (1954); *Napa Valley Electric Co. v. Railroad Comm'n of California,* 251 U.S. 366, 371-373 (1920); *Southern Pacific Transp. Co. v. Pub. Util. Comm'n of California,* 716 F.2d 1285, 1289-1291 (9th Cir. 1983), *cert. denied,* 466 U.S. 936 (1984); *Pacific Tel. & Tel. Co. v. Pub. Util. Comm'n of California,* 600 F.2d 1309, 1311-1312 (9th Cir.), *cert. denied,* 444 U.S. 920 (1979); *Consumers Lobby Against Monopolies v. Pub. Util. Comm'n,* 25 Cal.3d 891, 901 (1979) (recognizing the applicability of the doctrines of res judicata and collateral estoppel to federal court challenges to the orders of the CPUC).

---

[4] The CPUC merely wishes to preserve its rights and is not contending that the Solicitor General is engaged in a collusive appeal.

A fundamental rule of our legal system is that "[a] final judgment on the merits of an action precludes the parties or their privies from litigating issues that were or could have been raised in that action." *Federated Department Stores v. Moitie,* 452 U.S. 394, 398, 401 (1981). Federal courts are specifically required to give the same preclusive effect to any statute or judicial decision of a State which would be given under the law of the State. *Migra v. Warren City School District,* 465 U.S. 75, 81 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982); *Allen v. McCurry,* 449 U.S. 90, 96 (1980); *see also Haring v. Prosise,* 462 U.S. 306 (1983). The Full Faith and Credit Statute, 28 U.S.C. §1738, codifies this principle. By that statute, Congress has mandated that full faith and credit be accorded to the statutes and judicial decisions of the States in order to promote comity within the federal system, prevent unnecessary litigation and conserve the resources of the federal courts. *Migra, supra,* 456 U.S. at 84.

Petitioners' arguments, rejected on the merits by the summary denial of their petition for review by the California Supreme Court, have been fully and fairly resolved adversely to petitioners. The California Supreme Court's denial of review constitutes a final court decision rejecting those claims within the meaning of §1738.[5] For this additional reason, the petition should be denied.

---

[5] To the extent it might be argued that CPUC orders concerning the crossover ban constitute legislative rather than judicial determinations because they were made in the course of a ratemaking case, it has long been settled that the process of judicial review renders a ratemaking decision a "judicial" decision rather than a legislative determination for preclusion purposes. *See Detroit & Mackinac Ry. Co. v. Michigan Railroad Comm'n,* 235 U.S. 402, 406 (1914).

CONCLUSION

It is apparent that this case does not present one of the paramount statutory issues to be confronted by the Court this Term. The State of California's arduous six-year effort to defend its jurisdiction to protect captive customers from the coercive influence of the FERC's findings and conclusions is now entitled to finality. The petition for certiorari should be denied.

Respectfully submitted,

PETER ARTH, JR.
EDWARD W. O'NEILL
MARK FOGELMAN*

Public Utilities Commission
of the State of California
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-1992
*Counsel of Record

Attorneys for Respondent
California Public
Utilities Commission

March 28, 1997

Supreme Court, U.S.
FILED
MAR 31 1997
OFFICE OF THE CLERK

No. 96-1179

In the Supreme Court of the United States

OCTOBER TERM, 1996

INDICATED EXPANSION SHIPPERS, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

SUSAN TOMASKY
General Counsel
JOSEPH S. DAVIES
Acting Solicitor
TIMM L. ABENDROTH
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

14 pp

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission (FERC) can take into account the impact on matters within its jurisdiction of state regulation that, under the Hinshaw Amendment to the Natural Gas Act, 15 U.S.C. 717(c), is otherwise a matter of exclusive state jurisdiction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

FPC v. *Conway Corp.*, 426 U.S. 271 (1976)	11
FPC v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961)	11
KansOk Partnership, 73 F.E.R.C. (CCH) ¶ 61,160 (Nov. 2, 1995)	8
Louisiana Gas Sys. Inc., 73 F.E.R.C. (CCH) ¶ 61,161 (Nov. 2, 1995)	8
Pacific Gas Transmission Co., 76 F.E.R.C. (CCH) ¶ 61,246 (Sept. 11, 1996)	6
Union Pac. Fuels, Inc. v. *Southern California Gas Co.*, F.E.R.C. (CCH) ¶ 61,300 (Sept. 19, 1996), reh'g denied, 77 F.E.R.C. (CCH) ¶ 61,283 (Dec. 19, 1996), petition for review pending *sub nom. Public Util. Comm'n of California* v. *FERC*, No. 97-1028 (D.C. Cir.)	8
United Distrib. Cos. v. *FERC*, 88 F.3d 1105 (D.C. Cir. 1996), petitions for cert. pending, Nos. 96-1186, 96-1187, 96-1188 & 96-1189	9, 10

Statutes and regulation:

Natural Gas Act, 15 U.S.C. 717 *et seq.*:	
§ 1(c), 15 U.S.C. 717(c)	2, 3
§ 7(e), 15 U.S.C. 717f(e)	2, 4, 6
18 C.F.R. 385.602(h)(1)(i)	6

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1179

INDICATED EXPANSION SHIPPERS, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 92 F.3d 1239. The opinions of the Federal Energy Regulatory Commission (Pet. App. 19-303) are reported at 54 F.E.R.C. (CCH) ¶ 61,035, 56 F.E.R.C. (CCH) ¶ 61,192, 57 F.E.R.C. (CCH) ¶ 61,097, and 62 F.E.R.C. (CCH) ¶ 61,243.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1996. Petitions for rehearing were denied on October 24, 1996. Pet. App. 305-306. The petition for a writ of certiorari was filed on January 22, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a condition placed by the Federal Energy Regulatory Commission (FERC) on a certificate of public convenience and necessity that FERC granted under Section 7(e) of the Natural Gas Act (NGA), 15 U.S.C. 717f(e). The certificate authorized Pacific Gas Transmission Company (PGT) to expand its pipeline facilities for transporting gas from Canada to Malin, Oregon, at the California border. Because FERC concluded that rates and conditions on the use of PGT's pipeline expansion discriminated against interstate shippers, FERC imposed a condition on the certificate until PGT could demonstrate that it no longer discriminated. The court of appeals invalidated that condition. Petitioners are some of the interstate gas shippers that intended to use PGT's expansion facilities, but that opposed what they viewed as discriminatory practices impairing their competitive position.

1. PGT's pipeline connects at Malin to the facilities of PGT's parent company, Pacific Gas & Electric Company (PG&E). Pet. App. 4. Whereas PGT's pipeline runs interstate and thus is subject to the Natural Gas Act, PG&E's facilities are entirely within the State of California, and thus are regulated by the California Public Utilities Commission (CPUC) pursuant to the Hinshaw Amendment to the NGA, 15 U.S.C. 717(c). The Hinshaw Amendment exempts from the NGA those companies that, like PG&E, receive gas within or at the boundary of a State if all

the gas is consumed within the State and subject to state commission regulation.[1]

Pursuant to its authority under the Hinshaw Amendment, the CPUC authorized PG&E to expand its facilities in California in order to receive the additional gas from PGT's expansion for distribution in California. PGT then placed a condition on shippers seeking to use its proposed interstate pipeline expansion, requiring them contractually to commit also to use PG&E's proposed expansion facilities in California. Petitioners believed that requirement would make it uneconomical for them to sell gas in California in competition with PG&E. Pet. App. 4-6.

2. Before FERC granted PGT's certificate, petitioners opposed PGT's application, contending that PGT's contractual requirement that they use

---

[1] Section 717(c) states:

> The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the [Federal Energy Regulatory] Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

PG&E's planned, expensive expansion facilities in California constituted an illegal "tie-in." On August 1, 1991, FERC issued a certificate authorizing PGT's expansion under Section 7(e) of the NGA, 15 U.S.C. 717f(e), subject to the condition, *inter alia*, that PGT modify its contracts with petitioners to eliminate the tie-in. Pet. App. 88-234.

3. After PGT complied with FERC's condition, the CPUC issued orders with respect to PG&E that had the same tie-in effect. Those orders required petitioners to use PG&E's expensive expansion facilities before they could "cross over" to PG&E's pre-existing, lower-priced facilities. They also imposed a "postage stamp" rate structure (*i.e.*, one employing flat rates that did not vary with distance) that effectively required petitioners to pay PG&E as much for transportation of gas to customers in Northern California, just across the border from the terminus of PGT's interstate pipeline at Malin, Oregon, as they would have paid for transportation to Southern California. See Pet. App. 203-211.

4. On October 24, 1991, FERC modified its August 1 order in response to additional demand for gas that had arisen in California. Pet. App. 64-85. In lieu of its earlier requirement that the tie-in be eliminated before PGT could go forward with construction, FERC authorized the construction to proceed, but reduced PGT's rate of return on equity on its expansion facilities from 12.50 to 10.13% until such time as PGT demonstrated that neither its rates and practices nor those of PG&E "result in unduly discriminatory restraints on shippers' access to transportation on PGT's expansion project and transportation service within California." *Id.* at 84.

Petitioners and other parties sought rehearing before FERC, arguing that the rate-of-return condition would not be effective in eliminating the discrimination, and that FERC should not have authorized construction under those circumstances. Pet. App. 57. In its order on rehearing, FERC adhered to its decision, explaining that it "consider[ed] PGT's reduced rate of return * * * [a] condition reasonably tailored to accomplish [FERC's] goal of inducing a change to a policy beyond [FERC's] jurisdictional purview." *Id.* at 60. FERC stated it would not "dictate the form a remedy might take" that would lead it to lift the rate-of-return condition it imposed on PGT, because "the unduly discriminatory rate conditions are the product of rate and transportation policies subject to the jurisdiction of the CPUC." *Id.* at 58.

5. On appeal, PGT and the CPUC argued that FERC exceeded its jurisdiction in imposing the rate-of-return condition on PGT in order to influence regulatory authority reserved to the State under the Hinshaw Amendment. Petitioners and others supported FERC's exercise of jurisdiction, but argued that the PGT/PG&E arrangement that the CPUC sanctioned was unduly discriminatory and the rate-of-return condition would be ineffective to remedy the discrimination. See Pet. App. 4.

The court granted PGT's petition for review and denied those of the expansion shippers (petitioners in this Court).[2] The court of appeals held that FERC

---

[2] Before the court of appeals entered its judgment, PGT entered into a settlement with certain of its customers, including the petitioners in this case (with the exception of Chevron U.S.A.). The settlement established rates PGT would be permitted to charge under new rate schedules proposed by PGT to replace the schedules FERC approved. Pursuant to

could not use its Section 7(e) authority under the NGA, 15 U.S.C. 717f(e), to condition the certificate it issued to PGT for the purpose of inducing PGT to pressure the CPUC to change the rate design authorized for PG&E. The court identified the "pivotal question" as "whether the Commission may exercise its power over an interstate pipeline in a manner intended to influence a state agency's regulation of a Hinshaw pipeline." Pet. App. 15. The court held that FERC could not exercise its Section 7(e) certificate power as it had in this case:

> The Commission lowered PGT's return on equity specifically and only to "induc[e] a change to a policy beyond [its] jurisdictional purview," *i.e.*, to pressure the CPUC to regulate PG&E as the Commission desired but could not itself require. Under the circumstances, the Com-

---

the settlement, the customers agreed not to oppose elimination of the 10.13% rate-of-return condition FERC had imposed on PGT. PGT in turn agreed that, if it prevailed in the pending appeal, it would not assess the customers for the revenues it lost due to the 10.13% rate-of-return ceiling. Following the court of appeals' decision, FERC approved the settlement, imposing it as a decision on the merits as to the customers who had protested it. *Pacific Gas Transmission Co.*, 76 F.E.R.C. (CCH) ¶ 61,246, at 62,273-62,274 & n.69 (Sept. 11, 1996); see 18 C.F.R. 385.602(h)(1)(i) (authorization for imposition of settlement). Petitions for rehearing of FERC's order approving the settlement are pending. The existence of the settlement, FERC's order approving it, and the pending proceedings concerning that order are additional reasons to deny certiorari here.

> mission was indeed attempting to do indirectly what it could not do directly.

Id. at 16. The court observed that, "[g]iven a proper evidentiary record," FERC could have "avoided any Hinshaw restraint on its jurisdiction by concluding that PGT and PG&E undertook this project as a single company." *Id.* at 12. The court noted, however, "that the Commission did not reach this conclusion," and the court therefore treated PGT and PG&E "as distinct companies, as did the Commission." *Ibid.*

ARGUMENT

We read the court of appeals' decision more narrowly than do petitioners, and thus do not believe that certiorari is warranted. Although petitioners themselves "agree with the Circuit Court's conclusion that FERC may not adopt a remedy with the intent to 'influence a state agency's regulation of a Hinshaw pipeline'" (Pet. 20 (quoting Pet. App. 15)), they characterize the decision below as broadly preventing FERC from exercising regulatory authority in other ways that affect Hinshaw pipelines, see, *e.g.*, Pet. 10, 11. Contrary to petitioners' contention, the court did not categorically preclude FERC from considering matters beyond its jurisdiction if they affect jurisdictional sales or transportation. The court of appeals' decision does not conflict with any decision of any other court of appeals or of this Court, and does not present an important or recurring issue. Review is therefore unwarranted.

1. Petitioners misread the court of appeals' decision when they contend that it "inverts" preemption doctrine and "renders FERC powerless to protect interstate shippers of gas from unduly discriminatory and anticompetitive conditions if those conditions are

imposed by a State agency in the guise of 'rate policies' regarding a Hinshaw pipeline." Pet. 9; see also Pet. 16. Neither the court of appeals nor FERC held that FERC could not have alleviated the precise discrimination posed by the CPUC's action by, for example, treating PGT and PG&E as a single entity, or by exercising federal statutory authority in a manner that would preempt contrary state law. Petitioners themselves acknowledge that the court of appeals "did not reach the issues raised by [petitioners]," Pet. 6, and that the court recognized that FERC might have "avoided any Hinshaw constraint upon its jurisdiction by concluding that PGT and PG&E undertook this project as a single company," Pet. 15 n.8 (quoting Pet. App. 12).

As the court of appeals pointed out (Pet. App. 10-12), in circumstances in which the record shows that Hinshaw status is used to subvert FERC's jurisdiction over interstate transportation and obtain an unfair competitive advantage, FERC may "disregard the separate corporate status of entities that would otherwise be considered nonjurisdictional." *Id.* at 12 (citing *KansOk Partnership*, 73 F.E.R.C. (CCH) ¶ 61,160, at 61,484 (Nov. 2, 1995); *Louisiana Gas Sys. Inc.*, 73 F.E.R.C. (CCH) ¶ 61,161 (Nov. 2, 1995)). Indeed, since the court of appeals' decision in this case, the Commission has exercised its authority under federal law to invalidate certain charges assessed by a local distribution company regulated by the CPUC. *Union Pac. Fuels, Inc.* v. *Southern California Gas Co.*, 76 F.E.R.C. (CCH) ¶ 61,300 (Sept. 19, 1996), reh'g denied, 77 F.E.R.C. (CCH) ¶ 61,283 (Dec. 19, 1996), petition for review pending *sub nom. Public Util. Comm'n of California* v. *FERC*, No. 97-1028 (D.C. Cir. filed Jan. 14, 1997). In sum, contrary to

petitioners' contentions, the court of appeals' decision merely precludes FERC from using its authority for the purpose of pressuring interstate pipelines to influence state regulation of intrastate activities; it does not circumscribe FERC's exercise of its remedial authority in other ways.

2. Petitioners mistakenly claim (Pet. 14-21) that the court of appeals held that FERC may not exercise its authority under the Natural Gas Act in a manner that preempts state regulatory efforts. FERC never invoked its preemptive authority here, and the court below did not reach that issue. Petitioners therefore err in asserting (Pet. 15) that this case is in conflict with *United Distribution Cos.* v. *FERC*, 88 F.3d 1105 (D.C. Cir. 1996), petitions for cert. pending, Nos. 96-1186, 96-1187, 96-1188 & 96-1189 (filed Jan. 27, 1997). In *United Distribution*, the District of Columbia Circuit upheld FERC's preemption of state regulation over buy-sell transactions where FERC had found that state regulation interfered with its authority to regulate interstate transportation. *Id.* at 1156-1157.[3] The court of appeals upheld the FERC order establishing a uniform capacity-reallocation program against a claim that, to the extent that it applied to capacity held by local distribution companies, the order violated the Hinshaw Amendment. As the court of appeals explained, "the Commission's authority to regulate capacity release arises from its jurisdiction

---

[3] As the court explained in *United Distribution*, 88 F.3d at 1154-1155, buy-sell transactions occur when an end user of gas purchases gas at a point of production, and a local distribution company (LDC) that services the end user transports the gas first under its own transportation rights on an interstate pipeline and later across its local distribution facilities to the end user.

over the interstate pipeline that consummates the transaction and the subject of the transaction, the interstate transportation of gas, entirely independent of its jurisdiction over the releasing or replacement shipper." *Id.* at 1153 n.62 (as amended Oct. 29, 1996 (amendment order reprinted in Appendix B to Pacific Gas Transmission Co. Br. in Opp.)). The situation here, where FERC never invoked its preemptive power, is not analogous to the situation in *United Distribution*.

3. Petitioners misconstrue the opinion of the court of appeals when they state that "FERC is stripped of its ability to even consider the consequences [of state regulation] on interstate shippers of natural gas simply by virtue of the source of those consequences," and that the upshot of the court's opinion "is that the Hinshaw exemption is so exclusively insulative that a Hinshaw pipeline and/or its state regulatory body could promulgate any variety of policies antithetical to the rights of interstate shippers." Pet. 9. Petitioners take out of context a sentence in the opinion's concluding paragraphs stating that this case involves "an express congressional reservation of jurisdiction to another body," which "places the matter off limits to the FERC." Pet. 8-9. Read together with the court's acknowledgement (Pet. App. 12) that FERC could have treated PGT and PG&E as a single entity and thus subjected the overall arrangement to federal regulatory authority, the court's statement is correctly understood as limited to the circumstances of this case, in which FERC sought to induce an interstate pipeline to seek to influence the State to reverse its regulatory action. Indeed, in the sentence preceding that statement, the court acknowledged that "the Commission

ordinarily has the authority to consider a matter beyond its jurisdiction if it affects jurisdictional sales." *Id.* at 17. The language upon which petitioners rely refers only to a situation in which FERC used its authority over the rates of an interstate pipeline in order "to induc[e] a change [of state] policy," *id.* at 60—action that petitioners agree the agency may not take. Pet. 13 n.4.[4]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

SUSAN TOMASKY
General Counsel

JOSEPH S. DAVIES
Acting Solicitor

TIMM L. ABENDROTH
Attorney
Federal Energy Regulatory Commission

MARCH 1997

---

[4] Petitioners seek support (Pet. 10-13) for their position in the manner in which the court of appeals distinguished this case from *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976), and *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961). Contrary to petitioners' contentions, however, the court of appeals did not read those decisions categorically to bar FERC from exercising its remedial authority in a way that may affect sales or transportation under state regulatory jurisdiction. Rather, the court reasoned that those decisions did not support FERC's effort indirectly to change state rate policies by pressuring an interstate pipeline through a reduction of its rates. See Pet. App. 14-16.